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Office of Administrative Law Judges
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Issue date: 18Oct2001

Case No.: **2000-ERA-0031**

In the Matter of:

RICHARD M. KESTER,
Complainant,

v.

**CAROLINA POWER AND LIGHT
COMPANY,**
Respondent.

and

**DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,**
Party-in-Interest.

Representation:

Before: **RICHARD K. MALAMPHY**
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the Energy Reorganization Act of 1974 (hereinafter "the Act"), 42 U.S.C. §5851, and the regulations promulgated thereunder at 29 C.F.R. Part 24. The Act prohibits a Nuclear Regulatory Commission licensee from discharging or otherwise discriminating against an employee who engaged in activity protected by the provisions of the Act.

A formal hearing was held on January 23, 2001 before the undersigned Administrative Law Judge in Raleigh, North Carolina. All parties were afforded full opportunity to present evidence and arguments as provided in the Act. Both parties submitted post-hearing briefs on April 2, 2001. Carolina Power and Light (CP&L), filed a reply brief on May 4, 2001. On May 31, 2001, both parties submitted final briefs in the case.

On May 29, 2001, Complainant, Richard Kester, filed a Motion to Amend the Complaint to Conform to the Evidence pursuant to 29 Code of Federal Regulations §18.43(c). Complainant argues

that he presented evidence at the hearing that he was discriminated against for engaging in two protected activities: (1) that he was about to assist and participate in an NRC investigation, and (2) that he made an internal complaint about Robert Gill's efforts to make him lie to the NRC inspector. In its Response to Complainant's Request to Amend the Complaint, Respondent, CP&L, argues that Complainant did not present evidence at the hearing, which indicated his pursuit of a claim based on the protected activity of his assistance and participation in the NRC investigation. Thus, Respondent did not have the opportunity to object or consent to that argument or the presentation of evidence related to that activity. After engaging in an exhaustive review of the record, the court finds that Complainant did not present arguments or evidence at the hearing in support of a claim based on his general participation in the NRC investigation. Therefore, the court denies Claimant's Motion to Amend the Complaint. Arguments related to Complainant's participation in the NRC investigation and the alleged discrimination attached thereto will not be considered.

Based upon a review of the entire record of this case, and the applicable law, the undersigned reached the following findings of fact and conclusions of law. Where appropriate, consideration is given to the undersigned's observation of the appearance and demeanor of the witnesses. Each exhibit in the record has been carefully considered whether or not it is specifically mentioned in this recommended decision.

Stipulations

The parties stipulated to the following facts:

1. Employer falls within the jurisdiction of the Act.
2. Complainant is or was an employee of Carolina Power and Light.

The undersigned accepts these stipulations.

Issues

Whether CP&L violated the provisions of the Act.

Findings of Fact¹

Employment at CP&L

On August 1, 1996, Richard Kester applied for and received a full-time position at CP&L

¹The following abbreviations will be used as citations to the record:

Rx.- Respondent's exhibits;
Cx.- Complainant's exhibits; and
Tr.- Transcript of hearing.

based, in part, on the recommendation of Robert Gill.² (Tr. at 33, 436; Cx. 8.) Kester worked as a principal support analyst at CP&L for approximately twelve to fourteen months. (Tr. at 34, 366.) As a principle support analyst, Kester “worked in the group to support the three security superintendents in anything they needed from the corporate office for the three nuclear plants.”³ (Tr. at 43-44.) At the time, Gill was the security manager and director of access authorization at CP&L and supervised Kester’s work. (Tr. at 43, 44.)

The access authorization group, a part of the corporate security department, handles background investigations and background clearances for employees or contractors who need access to the nuclear power plants. (Tr. at 36.) An individual seeking access to the nuclear power plant must fill out a personal history questionnaire, provide fingerprints and urinalysis, and submit to a psychological exam. (Tr. at 38.) The department performs two independent reviews to verify the accuracy of the information the individual provides on the personal history questionnaire. (Tr. at 36, 40.) If the individual proves to be drug free and psychologically sound and the questionnaire is filled out and successfully reviewed, then the individual will be cleared for access. (Tr. at 38.) The corporate office then faxes a certification letter to the nuclear power plant. (Tr. at 40.) At the same time, someone in the corporate office enters the certification date into the computerized access tracking system (hereinafter “CATS”). (Tr. at 40.) When the plant has the certification date, it can generate an access badge for the individual using a Polaroid system that is connected to the computer database. (Tr. at 40.) At that point, the individual can access the nuclear power plant by displaying his badge. (Tr. at 41.)

Gill was in charge of the access authorization department during the spring of 1997. (Tr. at 47, 414.) At that time, the company had a substantial problem with unauthorized access at the Shearon Harris nuclear facility. (Tr. at 46.) The access authorization department provided improper background reviews that allowed certain individuals to have access to the nuclear plant during an outage.⁴ (Tr. at 46.) Three main problems arose in the department: (1) a worker with a prior criminal conviction for drug possession received a badge and had unescorted access to the plant for more than a month; (2)

²Kester met Gill in 1991 when Kester was employed as a contract security employee at Limerick Generating Station near Pottstown, Pennsylvania. (Tr. at 28-30, 364.) At that time, Gill was the manager of nuclear security at Limerick and authorized Kester’s contract for hire as manager of the security guard forces. (Tr. at 364-365.) Gill later recommended a position at CP&L to Kester. (Tr. at 33.)

³CP&L operates three nuclear power plants: the Brunswick nuclear plant in Southport North Carolina, the Robinson plant in Hartsville, South Carolina, and the Shearon Harris plant outside of Raleigh, North Carolina. (Tr. at 12.)

⁴Outages occur periodically “to allow maintenance on components that can’t be worked on while the plant is up and running for safety reasons....Plant maintenance for an outage requires a lot of contract personnel, all the way from laborers to engineers.” (Tr. at 41-42.) Access authorization must perform background investigations on the additional people who need access to the plants during the outages, so the department has a tremendous amount of work to handle during the pre-outage period. (Tr. at 42-43.)

three workers had unescorted access to the plant for a month despite the fact that a psychologist had put these workers on hold status⁵; and (3) the company discovered fourteen discrepancies in the security events log.⁶ (Tr. at 47-48, 430.)

At the time, Robin Newsome was the principal support analyst for access authorization and reported directly to Gill. (Tr. at 50, 53.) The NRC investigated the incidents issued a level three violation and \$55,000 fine.⁷ (Tr. at 48; Cx. 33, Cx. 34.) The company did not terminate, demote or transfer Gill to another department as a result of the incident. (Tr. at 50, 227.) The company did not terminate but did demote Robin Newsome for the security breaches which led to the NRC investigation. (Tr. at 50, 433.) One reviewer, Al Dame, lost his job as a result of the incidents. (Tr. at 50.)

After the problems at the Harris plant in 1997, CP&L made Fred Underwood the supervisor of access authorization. (Tr. at 52.) Underwood reported to Gill, who remained as the manager of corporate security, and Newsome reported to Underwood.⁸ (Tr. at 52.) Underwood and Newsome had a troubled working relationship. (Tr. at 442.) Ferris Scouren from Human Resources documented a conversation with Bob Gill on November 24, 1997, in which Gill stated: “[Underwood] said they had problems, and that Fred was developing a performance plan on [Newsome].” (Tr. at 442; Cx. 126.) According to Scouren, “[Gill] stated that [Newsome] wasn’t grasping some of the technical aspects of her job.” (Tr. at 442; Cx. 126.) Kester learned of Newsome’s problems with Underwood later. (Tr. at 442.) He testified that he had an encounter with Newsome where Newsome was “sobbing” because she had been placed on a performance plan. (Tr. at 52.) After this conversation, Kester went to Gill’s office and told him that Newsome was extremely upset and that she had been put on a performance plan. (Tr. at 53.) According to Kester, Gill stated, “[Newsome] ain’t worth a shit....And she’s going to have to improve or she’s going.” (Tr. at 53.)

Kester testified that Newsome was “swayed to go to Harris Plant in a subordinate position as senior analyst. That’s a drop down a couple of rungs from principal analyst.” (Tr. at 54-55.) Around December 1997 or January 1998, Bob Moorehead, the vice president in charge of access authorization at the time, created a new position for Newsome as a compliance analyst for the security section. (Tr. at 55, 444.) Moorehead asked Gill to make a place for her in his organization and, as a compliance

⁵CP&L eventually cleared two of the individuals for access to the plant, but one individual was never able to satisfy the psychological testing. (Tr. at 428.)

⁶Workers who were not properly cleared for access entered the plant during the outage and had access to the protected and vital areas of the plant. (Tr. at 427-428.) CP&L did not discover these problems until after the outage ended. (Tr. at 428.)

⁷Level one is the most severe violation and level four is the least severe. (Tr. at 48.)

⁸The company ultimately transferred and demoted Underwood to the position of principle support analyst in charge of the employee assistance program after CP&L investigated allegations that Underwood committed racial discrimination. (Tr. at 80, 405.) Gill was involved in the decision to transfer Underwood to an individual contributor position. (Tr. at 405.)

analyst, Newsome reported directly to Bob Gill. (Tr. at 55, 444.)

Around the same time, CP&L promoted Kester to the position of acting superintendent of access authorization. (Tr. at 58.) He received positive feedback for his performance in that position. (Cx. 35, 36.) On April 26, 1998, Kester received another promotion to the position of superintendent of access authorization. (Tr. at 58; Cx. 37.) At that time, the department was still dealing with the aftermath of the 1997 NRC investigation and \$55,000 fine. (Tr. at 437.) Kester provided necessary leadership and discipline for the department. (Tr. at 437.) He reported directly to Bob Gill.

During Kester's tenure as superintendent, access authorization received a glowing report for the way it handled an outage at the Brunswick plant. (Tr. At 62; Cx. 38, 143.) Access authorization also received commendations for the work done for an outage at the Harris and Robinson plants. (Tr. at 68-69; Cx. 36, Cx. 48, Cx. 143.) Kester received a performance award based on the work that he did in preparation for the Harris outage. (Tr. at 69; Cx. 49.) He received the performance award from Gill on December 9, 1998, which was five months before he was fired. (Tr. at 69-70.)

The company administered a company-wide employee survey in December 1998. (Tr. at 82; Cx. 52.) Kester attended a presentation by Bill Johnson, the vice-president in charge of corporate department, which outlined the results of the survey.⁹ (Tr. at 82.) At that time, Kester did not receive any negative feedback on his performance as a result of the employee survey. (Tr. at 83.) The results of the employee survey demonstrated that the department improved from 1997 to 1998. (Tr. at 83.)

The 1998 NRC inspections of access authorization were fine. (Tr. at 85; Cx. 51.) Nineteen self-assessments showed excellent results for the department. (Tr. at 86.) Gill stated that he was pleased with the status of the goals the department had established at the beginning of 1998 and the results achieved by January 1999. (Tr. at 86-87; Cx. 54.) According to Kester, Gill told Kester in January 1999 that "the biggest problem he had with [Kester] was that [Gill's] job [was] getting boring because he didn't have to look in on access authorization because [Kester] was doing such a fine job." (Tr. at 87.)

Gill, however, testified that he started to sense problems in access authorization in late December or early January of 1999. (Tr. at 367.) He stated:

I was approached by an employee who expressed concern to me that she understood that Rich was asking his direct reports or employees not to communicate certain issues to her, to keep her out of the loop. This particular employee was a compliance employee. That was a concern for me, because her role was to insure, help insure compliance in that organization.

(Tr. at 367.) Gill later identified the complaining employee as Robin Newsome. (Tr. at 438.) He testified that Newsome "just advised [him] of a concern she had. And [he] just took it under advisement." (Tr. at 445.) He stated that he did nothing to follow up on the complaint in late 1998 or

⁹Corporate services began reporting to Bill Johnson in January of 1999. (Tr. at 795-796.)

early 1999. (Tr. at 445-446.)

Gill testified that Bill Johnson notified him in early 1999 that the 1998 survey results might reflect poorly on Kester. (Tr. at 367; see Cx. 52.) Gill testified:

What Bill expressed to me was that Cindy Johnson, an employee outside of corporate security access authorization at the time approached him and said that she was there representing a group of employees out of access authorization that were concerned that the employee survey results were going to be negative, and they wanted to make it clear that it was not a reflection on me, Bob Gill, but that it was a reflection on Rich.

(Tr. at 368.) At the time, Johnson did not ask Gill to address the issue with Kester. (Tr. at 558.) Johnson later testified that he would never have terminated Kester based solely on his conversation with Cindy Johnson. (Tr. at 823.)

Gill testified that he talked to Shawn Nix from Human Resources in December 1998 or January 1999 about how to handle the situation with Kester. (Tr. at 368, 455.) He did not document their discussions in writing. (Tr. at 455.) Gill stated, “I recall sitting down and meeting with her on the floor, I asked her for a few minutes of her time to kind of go over where I was at.” (Tr. at 455.) Nix counseled him to work through the employee concerns with Kester. (Tr. at 368.) Despite their close friendship and working relationship, Gill did not tell Kester about Newsome’s concern or that employees had made anonymous complaints about him until March 5, 1999. (Tr. at 456-458.)

On February 1, 1999, Gill gave Kester his performance evaluation for 1998 and, on February 4, Gill signed it. (Tr. at 87; Cx. 70.) In the multipoint feedback part of the evaluation¹⁰, Kester was marked as having strengths in five areas, including personal responsibility, team work, judgment, communications, and champion of change. (Tr. at 88-89.) He did not receive the lowest rating, “improvement opportunity,” in any area. (Tr. at 88-90.) Based on his evaluation, Kester received a four percent increase in pay, which was a higher increase than most employees received. (Tr. at 92.) Less than three months after Kester received his evaluation, CP&L fired him. (Tr. at 92.)

As the new superintendent of access authorization, Kester devised a system whereby access authorization would have sufficient personnel to handle the additional work for scheduled outages. (Tr. at 73-74.) He determined that the additional employees could handle the company’s routine background investigations during non-outage periods. (Tr. at 74.) Prior to implementing the new system, Robin Newsome asked Richard Watson, the performance evaluation employee that handles the assessment of access authorization, to review Kester’s system for in-house background investigations. (Tr. at 350.) Kester testified that Watson’s review was an added measure to insure that the in-house program would “pass muster” during the annual inspection of access authorization. (Tr. at 351.) Kester stated that Robin Newsome reported to him that Watson approved the program. (Tr. at

¹⁰The multipoint feedback section allows an employee’s peers and team members to provide feedback about their perceptions of the employee’s performance during the year. (Tr. at 90.)

On November 17, 1998, Kester started the pilot program to handle background investigations in-house on a trial basis. (Tr. at 74.) In the past, CP&L used independent vendors to handle the company's background investigations. (Tr. at 74.) Kester made weekly reports to Gill about various aspects of the program, including: number of background investigations accomplished, average cost, time required to complete, savings on employment background investigations, long term and short term plans, procedure used to conduct investigations and so forth. (Tr. at 74-75; Cx. 47.) Kester testified that he produced a short-term plan for the program that he communicated to Gill verbally; however, he did not produce a formal written plan for the program. (Tr. at 299.) According to Kester, CP&L saved money by doing these investigations in-house. (Tr. at 77.) Kester testified that Gill ultimately approved the way that the in-house background investigations were handled and that he never asked Kester to stop what he was doing. (Tr. at 75, 350.)

Rebecca Johnson, a temporary CP&L employee, was hired as a file clerk during the last two weeks of the Harris Plant outage in 1998. (Tr. at 93.) As part of the pilot program, she was initially trained to assist with background investigations. (Tr. at 93.) Around November or December 1998, Pat Phillips and Linda Brenner-David, two employees in Kester's department, trained Johnson to accomplish nuclear and employment background investigations. (Tr. at 93-94.) Johnson verified the information contained on the personal history questionnaires provided by individuals who wanted design access to the nuclear plants or who sought employment at CP&L. (Tr. at 95.)

Falsification Events

Friday, January 29, 1999

On Friday, January 29, 1999, Robin Newsome, the compliance analyst who monitored access authorization and determined compliance with NRC regulations, performed some routine audits of the background investigations accomplished in the prior weeks.¹¹ (Tr. at 97, 105.) In a routine investigation of one of Rebecca Johnson's files, Newsome contacted an employer who could not remember speaking to anyone about a background check. (Tr. at 97-98.) Newsome asked Kester if he would give her permission to request Johnson's telephone records to establish whether Johnson actually contacted the number on the questionnaire. (Tr. at 98.) He approved Newsome's suggestion. (Tr. at 98.) He understood Newsome's position to be: "I don't think there's anything here, but I want to go and check a little bit more." (Tr. at 100.) Kester stated that he did not have enough information to do anything else at that time. (Tr. at 99-100.)

Monday, February 1, 1999

¹¹She provided specialized expertise for complex analytical and administrative activities. (Cx. 139.) She was also accountable for issue management and resolution from nuclear access authorization. (Tr. at 105.) Although Newsome's job description identifies her job function as access authorization, she did not report to Kester. (Tr. at 55, 104; Cx. 139.) She actually reported to Bob Gill. (Tr. at 105.)

Newsome did not do anything further until Tuesday, February 2nd, because she was absent from work on Monday, February 1st. (Tr. at 100.)

Tuesday, February 2, 1999

On the afternoon of Tuesday, February 2nd, Newsome notified Kester that the outgoing phone records established that Johnson made a phone call to the employer, but the records did not establish conclusively that Johnson asked the employer all of the necessary questions. (Tr. at 100-101.) Kester directed Newsome to investigate further by examining the incoming call records to determine whether Johnson actually completed the background investigation. (Tr. at 103.)

As a precaution, Kester decided that he would not allow Johnson to review any more files or do any more background investigations until the discrepancy was resolved. (Tr. at 102.) He left a note on Johnson's chair informing her that she should do the filing and not do any more background investigations until further notice. (Tr. at 102.) Kester expected that Johnson would receive the note the following morning on Wednesday, February 3rd. (Tr. at 102.) He also directed Pat Phillips and Robin Newsome to pull Johnson's files and audit the background investigations to determine whether Johnson actually made all the necessary calls in other cases. (Tr. at 102-103.)

Wednesday, February 3, 1999

By the afternoon of Wednesday, February 3rd, Newsome and Phillips discovered a number of discrepancies in the background investigations performed by Rebecca Johnson. (Tr. at 104.) Kester testified that he contacted Human Resources because he wanted someone from that department present when he confronted Johnson. (Tr. at 106.) When no one from Human Resources returned his message, he asked Robin Newsome to act as his witness. (Tr. at 106.) Johnson ultimately admitted that she falsified the records. (Tr. at 107.) At that point, Kester placed Johnson on administrative suspension pending the culmination of the investigation. (Tr. at 107.)

Kester told Phillips and Newsome that he wanted all backgrounds that Rebecca Johnson touched to be sent to an outside vendor immediately and reaccomplished.¹² (Tr. at 107.) Then, he stated: "in the meantime I want you to look at all the nuclear backgrounds first, they're the most significant, I want you to find out how many have been certified by our reviewers for access based on Rebecca Johnson's backgrounds...have that for me as soon as you can." (Tr. at 106-107.) Kester testified that he wanted Pat Phillips, who helped train Johnson in background investigations, to find out if anyone had been certified for access based on an investigation conducted by Johnson. (Tr. at 109.) Pat Phillips discovered that two individuals had been certified for nuclear plant access based on the background investigations Rebecca Johnson performed. (Tr. at 115.) One individual had been certified for the Robinson plant and one had been certified for the Harris plant. (Tr. at 115.)

¹²After the investigation into the falsification incidents, the NRC determined that "the individuals granted unescorted access authorization would have been granted access, if the background investigation had been actually verified." (Tr. at 225.) The reverification process revealed that the people cleared for access had nothing wrong with their work backgrounds or employment backgrounds, and that the individuals were cleared for proper access to the nuclear plant. (Tr. at 225.)

Kester testified that he talked to Shawn Nix about what had occurred to date, including Johnson's administrative suspension. According to Kester, Nix told him that he had handled the situation appropriately. (Tr. at 110-111.) Nix stated that she would not be able to review the documents until the following morning on Thursday, February 4th. (Tr. at 113.) Kester testified that Nix asked him to keep the situation confidential until she had the chance to ensure that everything was correct and to run the situation by the legal department. (Tr. at 113.) Kester stated that he could keep it confidential until the following morning. (Tr. at 113.) Shawn Nix, however, did not "recall a conversation with Kester during which [she] told him that he should keep the matter confidential until [the] Legal Department could review the matter." (Cx. 124.) The court notes that that Nix does not recall this conversation cannot be considered a denial that the conversation occurred.

Kester contacted David Crook, the supervisor of access authorization at the Robinson plant and Kester's direct report, by speaker phone. (Tr. at 115-116.) Kester directed Crook to destroy the faxed certification letter. (Tr. at 116.) Kester did not explain the reason why the certification letter had to be destroyed. (Tr. at 116.) The Robinson plant had not yet manufactured an access badge, so no one had accessed the plant based on the falsified background investigation. (Tr. at 117.) Kester told Crook that the access certification department would reaccomplish the background and provide the plant with a new certification letter. (Tr. at 115.) He also explained that the individual would not be certified until the new background investigation was completed. (Tr. at 116.)

Kester also contacted Bill Isom, the access supervisor at the Harris plant and Kester's direct report, and instructed him to destroy the other letter. (Tr. at 117-118.) Kester stated that the department would reaccomplish the background investigation and send him a new certification letter. (Tr. at 118.) He also ascertained that the Harris plant had not yet manufactured a badge, so no one could have accessed that plant either. (Tr. at 118.) Kester did not inform Isom of the reasons for the destruction of the letter.

At that point, Kester asked Phillips to give him the originals of the two certification letters kept at the corporate office. (Tr. at 118.) At the hearing, Kester testified:

I was thinking to myself—if I lay them somewhere and somebody accidentally inadvertently picked one up they may say, "oh, that needs to be faxed," fax it down there, the guy thinks it's a new background, go ahead and give them access....These letters are certification letters based on false information, so they're really false certification letters by the reviewers not having the right information. So I'm going to shred these and no one could possibly certify them for access without new ones.

(Tr. at 118-119.) He stated that neither Newsome or Phillips objected and he shredded the originals of the certification letters. (Tr. at 119.) He did not try to conceal from anyone what he did. (Tr. at 119.) He reiterated that he shredded the letters to insure that these two people could not get access to the nuclear plants based on falsified backgrounds. (Tr. at 119.) He testified that the files still contained all

of the data related to the falsifications.¹³ (Tr. at 119.)

On the evening of Wednesday, February 3rd, Kester and Newsome met with Gill in the conference room next to Gill's office and explained that Rebecca Johnson had falsified background investigations. (Tr. at 120.) Kester informed Gill that he had placed Johnson on administrative suspension and sent all of the backgrounds she touched to an outside vendor for immediate reaccomplishment. (Tr. at 121.) Kester also told Gill that he had directed the two plant supervisors to shred the faxed copies of the certification letters and that he had shredded the original letters. (Tr. at 121.) According to Kester, he explained his reasoning for the document shredding and Gill accepted it. (Tr. at 121.) Kester testified that Gill did not raise any objections to Kester's actions at that time and he never reprimanded Kester in writing or otherwise for the destruction of the certification letters. (Tr. at 121, 460.) The NRC later found that those certification letters were records used to grant access and, therefore, the company should have kept them for five years after the last day of access. (Tr. at 126-127.)

At the meeting, Newsome questioned whether they needed to make an NRC report. (Tr. at 121-122.) Kester opined based on his research that the regulations did not require a NRC report.¹⁴ (Tr. at 122.) According to Kester, Gill agreed and stated that he did not think the situation was reportable. (Tr. at 122.) Kester testified that he believed they were discussing a particular type of report that had to be generated within one hour of the incident. (Tr. at 124.) The NRC ultimately determined that a one hour call was not necessary. (Tr. at 126.)

Kester distinguished the one-hour phone report from log entries that needed to be made in the safeguards event log within twenty-four hours of an incident. (Tr. at 124-125.) He testified that:

Any type of security type violation or incident, they have to make – the sites have what they call a security events log that they keep for the NRC....Now all you do is you make a log entry, a typewritten log entry in the log and any time [the NRC] come to do an inspection, once or twice a year, they can review this log to see what's happened, what kind of mistakes has been made.

(Tr. at 124-125.) The company has twenty-four hours after discovery to make a log entry. (Tr. at 124.) The superintendent of security at each plant is responsible for making the entries and the logs are kept in the security section office of each plant. (Tr. at 125.) Kester testified that he, Newsome, and

¹³CP&L later initiated an internal investigation and determined that there was no evidence of a deliberate intent to conceal the falsification of documents or the destruction of the certification documents. (Cx. 109.)

¹⁴Kester stated, "when there is a significant adverse condition, you're required to telephonically notify the Nuclear Regulatory Commission." (Tr. at 122.) He indicated that the operations superintendent makes the report to the NRC regional headquarters on their twenty-four hour a day phone. (Tr. at 122-123.)

Gill did not discuss whether the incidents involving the certification letters based on falsified backgrounds needed to be logged. (Tr. at 126.)

In his interrogatory responses, Kester stated:

[d]uring the meeting with Bob Gill and Robin Newsome the evening of Feb. 3, 1999 to discuss the falsification event, Bob Gill asked me if I felt that a log entry was required. I informed him that I didn't think so. This was just my opinion. Bob Gill concurred. We all knew that the decision to make an entry rested with the Superintendents. Bob Gill during the meeting took charge of the event investigation through his assistant Robin Newsome. All decisions and actions subsequent to this meeting were at Bob Gill's direction.

(Rx. 6-15; Tr. at 357.)

Gill testified that they discussed the issue of whether the event should be logged at the February 3rd meeting. (Tr. at 374.) He stated:

[n]ever in my mind would I sit down and review reportability of a one hour, and not consider a safeguards event log. And it's my opinion that that evening, we didn't do that. We discussed the reportability of the event, whether it was a one hour reportable, or whether it was a safeguards event log.

(Tr. at 375.) According to Gill, Kester stated that the falsification event did not reach the level of reportability because the individuals did not gain access to the plants. (Tr. at 376.) Kester "consistently maintained the position that it was not a reportable condition." (Tr. at 389.) Kester testified that he remembered discussing whether the falsifications were reportable but denied discussing whether the falsifications were loggable. (Tr. at 358.) Gill testified that "reportable means either a safeguards event log entry or a one hour reportable." (Tr. at 389.) Gill testified that at the time he concurred with Kester's opinion that the falsifications were not reportable. (Tr. at 389.)

Gill stated that he relied on Kester's interpretation of the criteria for reportability under 9103 because he agreed with Kester's interpretation. (Tr. at 375-376.) Gill admitted that he could have overturned Kester's decision if he had not agreed. (Tr. at 375.) After CP&L's internal investigation concluded that the incident should have been reported to the site security personnel on January 29th, Gill reevaluated his position and determined that it should have been logged on that day. (Tr. at 459.) The NRC ultimately determined that there should have been log entries made within twenty-four hours of discovery. (Tr. at 126.)

Gill testified that he instructed Kester to file a condition report at the end of the meeting on February 3rd. (Tr. at 377.) A condition report is part of an internal mechanism to document an adverse

condition or event. (Tr. at 137-138.) The company can use the report to track the discovery of the condition, the corrective action taken to correct the event, and the future corrective action to prevent recurrence of the condition. (Tr. at 137.) It documents an adverse condition or event and is provided to plant operations and regulatory affairs at the affected plants for approval. (Tr. at 137.) If the adverse condition is significant, then an investigation occurs. (Tr. at 138.) Kester stated that “[i]nvestigating a significant adverse condition requires you to find the root cause and identify that, plus any contributing causal factors, also.” (Tr. at 139.) Kester testified that Gill did not instruct him to initiate a condition report at the meeting on February 3rd. (Tr. at 331.)

Kester testified that he told Gill that he would not be able to make a scheduled trip to the Robinson plant on the following morning of February 4th because he had to follow up on the investigation. (Tr. at 127.) According to Kester, Gill stated that he felt it was important that he and Kester attend the previously scheduled meeting. (Tr. at 461.) Kester stated that Gill indicated that Robin Newsome could follow up on the investigation. (Tr. at 127, 338.) Gill did not recall directing Newsome to follow up on the investigation; however, he did state that she was responsible for providing the available documentation to Shawn Nix and to the Legal Department on the following day, Thursday, February 4th. (Tr. at 129, 378.) The court notes that Gill’s statement that he did not recall directing Newsome to handle the follow-up cannot be considered a denial.

Kester testified that Gill took control of the situation at the February 3rd meeting. (Tr. at 337.) He stated, “As we came in, he put, wrote it all up on his white board. He— Newsome told him her part. He put that up there, my part, put it up there. He took control of the situation, asking questions, underlined portions he had wrote up on there and making assignments.” (Tr. at 337.) According to Kester, Gill made it clear that he would be in control. (Tr. at 337.) Kester stated that it was Gill’s custom to take charge when things went wrong. (Tr. at 337.)

Kester testified that Newsome mentioned to him after the meeting with Gill that they should have pulled the certification dates out of the computer database.¹⁵ (Tr. at 128.) Kester testified that he asked her to take care of the date removal on the following morning. (Tr. at 128.) He would have handled the date removal personally if he had stayed in Raleigh. (Tr. at 130.)

Thursday, February 4, 1999

On the following morning of Thursday, February 4th, Kester left directly from his home to travel to the Robinson plant. (Tr. at 130.) At that point, he knew of only two employees who had been certified based on the reviews done by Johnson. (Tr. at 130.) At the Robinson plant, Kester spoke with David Crook, the supervisor of access authorization at the plant, and told him that Rebecca Johnson had falsified background investigations. (Tr. at 131.) Kester told Crook that their conversation about Johnson had to remain confidential until Human Resources had a chance to meet with Robin Newsome to review the documents. (Tr. at 131.) According to a February 8, 1999 e-mail from Scott Young, the superintendent for physical security at the Robinson plant, Crook inquired about

¹⁵Kester testified that he could have deleted the certification dates from the computer database rather than destroy the certification letters to ensure that the individuals did not gain access to the nuclear power plants; however, he did not think of the solution at the time. (Tr. at 128.)

reportability or loggability and “he was told it was not loggable.” (Rx. 14.)

Crook strongly suggested that Kester “put in a condition report” about the situation. (Tr. at 131.) In response, Kester stated, “that’s all consideration, but...I’d kind of like to wait, I don’t think it’ll hurt anything to wait until we’ve got all our ducks in a row.” (Tr. at 131.) Kester testified that “Bob Gill took [him] aside in the conference room after he got there and he said, ‘look, you need to submit that thing now.’” (Tr. at 131-132.) At that point, Kester called the corporate office to initiate the condition report. (Tr. at 132.)

About the issue of the condition report, Gill testified: “[Kester] gave clear indication [to David Crook] that writing a CR¹⁶ was not a definite, that it was still a consideration, which was totally not true. And I had to bring Rich into a side room and speak with him about that.” (Tr. at 387-388.) According to Gill, he had to counsel Kester to issue the condition report. (Tr. at 388.) Gill testified that he was very critical of Kester for failing to initiate the condition report on February 3rd. (Tr. at 388; Rx. 3.) He testified that “[w]hen Rich characterized to David Crook that it was still up in the air, whether we would write a CR, that was inexcusable from my standpoint.” (Tr. at 388.) According to Bill Johnson, Gill later told him that Kester had refused to issue the condition report and that Gill had to tell Kester to issue the report several times before he did. (Tr. at 828-829.)

Kester testified that he telephoned Robin Newsome and asked her to submit the condition report about the falsification. (Tr. at 132.) According to Kester, Newsome stated that she would get Bobby Pope, a supervisor in access authorization, to do it. (Tr. at 132.) She also stated that Pope had been briefed about the incident. (Tr. At 132.) Kester testified that he suggested to Newsome that both she and Pope handle the condition report and she agreed. (Tr. at 132; Cx. 57.) Pope issued a condition report on February 4th, which described the:

file assessment performed by CAA¹⁷ identified discrepancies in the information provided by the BI¹⁸ investigator and that subsequently obtained from the sources. Sources and telephone records indicated that some of the investigation elements had not been completed as reported.

(Tr. at 133; Cx. 57.) At the time, the department was only aware of problems with two certifications. (Tr. at 134.)

According to Kester, he also asked Newsome about the status of the investigation. (Tr. at 132.) She had spoken with the Legal Department and Shawn Nix. (Tr. at 132.) Kester testified that she indicated that everything was taken care of and “everything’s a go.” (Tr. at 132.) Based on his

¹⁶The court notes that CR is the abbreviation for condition report.

¹⁷The court notes that CAA is the abbreviation for corporate access authorization.

¹⁸The court notes that BI is the abbreviation for background investigation.

conversation with Newsome, Kester assumed that the computer entries for the false certification letters had been fixed. (Tr. at 140.)

On the same day, Thursday, February 4th, Gill met with Scott Young, the superintendent of physical security at the Robinson Nuclear plant. (Tr. at 140.) Young maintains the safeguard event log for that plant. (Tr. at 141.) Kester assumed that Gill met with Young to discuss the falsification incident and whether it should be recorded in the safeguard event log. (Tr. at 141.) Later on Thursday, Young made a comment to Kester about what Gill was wearing that day. (Tr. At 142.) Kester testified:

Now this sat in my mind, Bob Gill definitely saw Scott Young and informed him about the falsification event. That's how I got it in – I made the assumption that Bob Gill – Scott Young confirmed that he had seen Bob Gill, that Bob Gill had told him about the falsification event, which later was determined not to be true.

(Tr. at 142.) If Young had made the log then, it would have been within the required twenty-four hour period. (Tr. at 143.) Kester did not mention the falsification problem to Young because he assumed Gill had already notified him. (Tr. at 143.) Assuming that Gill had notified Young about the falsification, Kester also assumed that Young or Gill would then notify the superintendents at the other plants of the incident so that they could record it in their logs. (Tr. at 143.)

At the end of February 4th, Kester believed that all of the pertinent certification letters had been destroyed and that Robin Newsome had deleted the certification dates from the computer system. (Tr. at 144.) He also believed that the superintendents of physical security at all of the plants had been informed of the falsifications so that they could make a log entry if necessary. (Tr. at 144.) Based on Gill's comments during the February 3rd meeting, Kester assumed that Newsome would follow-up on the rest of the investigation. (Tr. at 144-145.)

Friday, February 5, 1999

On Friday, February 5th, Kester took a flex day off, which he used to have a physical. (Tr. at 145.) Based on the results of the physical, his doctor, Jack Van, determined that Kester needed a colonoscopy. (Tr. at 146.) The colonoscopy revealed that Kester had a large tumor in his colon, so, on the advice of Dr. Agayoff, a specialist, Kester contacted a surgeon and scheduled an operation for March 26th to remove the tumor. (Tr. at 146-147.)

On February 5th, the access authorization department discovered that a third person had been certified for access based on a falsified background investigation done by Rebecca Johnson. Newsome called the Robinson plant and discovered that the plant had already manufactured a badge for this person on Wednesday, February 4th. (Tr. at 150, 157.) Newsome directed the plant to deny access to the third individual and to retrieve the badge from him and delete the certification date from the computer system. (Tr. at 157-158.)

No one had deleted the false certification dates from the computer on Wednesday, February

4th. (Tr. at 155.) The people on-site at the Robinson plant assumed that the certification date was good and issued the individual a badge based on that assumption. (Tr. at 155.) However, the individual had not yet accessed the Robinson plant. (Tr. at 155.) The badge was pulled on February 5th. (Tr. at 151.)

Both Gill and Newsome were at work when the situation occurred but did not contact site security about logging the incident. (Tr. at 339.) Gill was informed of the third certification problem right away on Friday. (Tr. at 158.) He stated that he did not call site security on Friday because “[the badging based on a third certification letter] was a continuation of the event that occurred on Wednesday, that [the employee] should not be in the protected area. In fact, [access authorization] completed the background simultaneously to discovering the event, the good background, so [Gill] didn’t see the need for [the phone call].” (Tr. at 408.) He determined that the issue had resolved itself because CP&L had received a good background check during the same time period that it learned that the individual had been badged. (Tr. at 470.) Gill also did not brief the department about the incident on Friday. (Tr. at 482.) He now believes that he should have reported the incident on February 5th to the site security responsible for the security events log. (Tr. at 472.)

Gill testified, “I remember asking Robin, or I did it myself, to get a hold of Rich and find out what was going on.” (Tr. at 469.) Newsome stated that she could not reach Kester. (Tr. at 470.) Kester testified that he left his beeper in the glove compartment of his truck while he attended his doctor’s appointment. (Tr. at 145.) He does not recall getting any messages or phone calls from the plant on that day or during the weekend of February 6th and 7th. (Tr. at 148-149.) Gill stated that he did not talk to Kester by phone on Saturday or Sunday. (Tr. at 475-476.)

Sunday, February 7, 1999

On Sunday, February 7th, Bob Gill was in the office and sent Kester a number of e-mails. An e-mail entitled “R. Johnson issue” directed Kester to brief Gill before noon on Monday regarding the issue and scope of the falsification situation, including the preparation of condition reports, the necessary corrective actions, reportability, staff briefing, the badging incident on February 5th, and so forth. (Tr. at 154; Cx. 69.) Gill did not copy this e-mail to Robin Newsome, even though she handled the events on Friday. (Tr. at 160.) According to Kester, this e-mail represented his first notification of the third certification problem discovered on Friday, February 5th. (Tr. at 158-159.) Gill handwrote a note on this memo which stated: “not properly handled, issue identified Friday, could have been even more significant, Rich was on flex Friday, he could not be reached, pager/home phone.” (Tr. at 159.) Gill testified that he wanted to question Kester about why the corrective actions did not work. (Tr. at 475.) In the e-mail, Gill stated that he wanted Kester to report to him about these events by noon on Monday, February 8th. (Tr. at 159.)

Gill sent another e-mail to Kester that referenced a Brunswick plant outage meeting scheduled for Monday, February 8th. (Tr. at 160.) The e-mail also referenced sixteen overdue items:

Do you have a recovery plan, have you discussed the week of

4/12 with DC¹⁹, when will PI's be available. Is there a kick off meeting? I owe you an answer on the training position. If we don't get it, what do we do. Do we have FFD coverage? Is there anything Wilton or Bobby need, et cetera?

(Tr. at 161-162.) Kester testified that the things mentioned in the e-mail would normally be discussed at the weekly meeting except for the sixteen overdue items. (Tr. at 162.) In a handwritten note on the memo, Gill stated that "planning appears to be lacking." (Tr. at 162.)

Gill entitled an additional e-mail "Weekly Report Questions." (Tr. at 162.) According to the weekly report, the corrective actions for two reported conditions were overdue. (Tr. at 163-164.) Kester testified that the condition reports remained overdue on the weekly report because the individual responsible for filing the update for the condition reports failed to provide the information to the person compiling the weekly report. (Tr. at 163.) Therefore, the individual handling the weekly report did not put completion dates on the condition reports and left them overdue. (Tr. at 163.)

Gill testified that he began interviewing people on Sunday, February 7th, to determine the validity of an anonymous complaint about Kester that Gill received sometime around Friday, February 5th. (Tr. at 179, 372, 477.) The complaint alleged problems with management in access authorization and requested outside intervention to resolve them. (Rx. 1.) Gill met with ten of Kester's employees and three of his supervisors over the course of about a month. (Tr. at 371.) He had finished interviewing Kester's employees by the end of February. (Tr. at 556.)

Monday, February 8, 1999

When Kester returned to work on Monday, February 8th, he had e-mail messages dated Sunday, February 7th, from Gill. (Tr. at 149; Cx. 69.) Before Kester could read his e-mail or listen to his voice mail, he received a phone call from David Crook, the access authorization supervisor at the Robinson plant. (Tr. at 149-150.) Crook briefed Kester about what had transpired in the investigation, including the events that occurred on Friday, February 5th.²⁰ (Tr. at 150.) Kester later learned that Pat Phillips had failed to identify a third individual that received a certification letter and badge based on Johnson's background investigation. (Tr. at 155.)

He testified that he was "dumbfounded" that Gill wanted a briefing about what occurred on Friday, February 5th, when Gill was in the office that day and knew that Kester had been absent. (Tr. at 154, 166.)

On Monday, February 8th, the site security superintendents still had not been informed of the

¹⁹The court notes the following abbreviations: DC for David Crook and FFD for fitness for duty. The Fitness For Duty section of corporate security administers employee drug testing. (Tr. at 37.)

²⁰Crook stated that one of his senior analysts had called him at home on Friday to brief him on the events. (Tr. at 150.) When Crook called Kester on Monday morning, he assumed that someone had also briefed Kester over the weekend. (Tr. at 150.)

latest badging incident. (Tr. at 340.) Crook wanted to know whether Scott Young, the superintendent of nuclear security at the Robinson plant, should be notified. (Tr. at 151.) Kester directed Crook to notify Young right away about the additional certification and badge problem. (Tr. at 150.) At the time, Kester assumed that this notification would be an addendum to the notification that Young received on February 4th. (Tr. at 151.) Kester did not realize that Crook's call to Young would be Young's initial notification of all of the falsification incidents. (Tr. at 151.)

Scott Young, superintendent of physical security at the Robinson plant, e-mailed and called Kester later on Monday morning to find out why he had not been notified about the falsification incident involving the Robinson plant. (Tr. at 168, 170.) He also wanted to know why someone did not make an entry into the security log at the plant. (Tr. at 170.) Kester testified that he explained to Young that he did not have all the details, but would provide a thorough briefing to him by Tuesday, February 9th. (Tr. at 169.) At that point, Kester realized that "[t]hings had definitely [gone] sour." (Tr. at 169.) He did not know why Newsome, Pope, or Gill did not notify security at the Robinson plant on Friday when they discovered that a badge had been issued. (Tr. at 170.)

Kester spoke to Robin Newsome when she arrived Monday morning about the events that transpired on Friday. (Tr. at 166.) According to Kester, Newsome stated that she had briefed Bobby Pope on Thursday morning, February 4th, and turned everything over to him. (Tr. at 166.) Kester testified that she did not recall telling Kester on Wednesday evening that she would delete the certification dates from the computer system. (Tr. at 167.) According to Kester, Bobby Pope stated that he did not know anything and that he "only got superficial details and he was told Robin Newsome was handling the follow up for the investigation." (Tr. at 166-167.) Pope also said that he did not have anything to do with the follow up investigation. (Tr. at 168.)

Kester met with Gill on Monday, February 8th, to discuss what transpired on Friday. (Tr. at 171.) He recounted the conversation at the hearing. (Tr. at 170-171.)

I said, "what happened." I said apparently nobody on the staff was briefed on Thursday, nor Friday. I said apparently somebody was given a badge on Friday. I said, "are you aware of that." He said yes.

I said, "well, what happened." He said, "you need to be telling me what happened." I said you got this thing — I said you were here Friday, right. He said correct. I said, "well you say you want to know what happened regarding the issues identified on Friday and I wasn't here," I said, "why didn't you talk to Newsome or Pope." He said well— I said, you know, I said you're hanging out a bit here on Friday. I said I don't think I can't be blamed for Friday, as I wasn't here. I was a bit upset. I said I don't see how I can be blamed for Friday, as I wasn't here.

He said, "well, if you had had your beeper on like you're

supposed to and if you'd respond to a beeper, things would've been better because they would have gotten a hold of you to take action. But as it was, you didn't respond to your beeper. Robin tried several times on Friday to beep you. You didn't respond to your beeper." And I said, "well, why wasn't I notified Friday evening or Saturday." No answer. That kind of ended the meeting right there.

(Tr. at 170-171.) After his meeting with Gill, Kester ascertained that no one in the access authorization department had been briefed on Thursday or Friday about Rebecca Johnson and the falsification problems. (Tr. at 172.) No one briefed the department about Johnson's administrative suspension or the fact that the company engaged an outside vendor to reaccomplish her backgrounds and that the backgrounds would be coming back to the department. (Tr. at 172.) People in the department were upset about the lack of briefing. (Tr. at 172-173.)

Kester stated that he would have briefed Bobby Pope, the supervisor for access authorization, and the access authorization department about the situation if he had conducted the investigation follow-up. (Tr. at 129.) He assumed that Robin Newsome, who had been tasked with the follow-up investigation, would be responsible for ensuring that the department was briefed.

Kester issued a condition report on Monday, February 8th, about the failure to notify security and the late log entry. (Tr. at 173; Cx. 59.) CP&L initiated an internal investigation during the month of February based on the condition reports generated by Pope and Kester about the falsification incidents. (Tr. at 173-174; Ex. 60.) During the month of February, Kester also handled the preparations for the Brunswick outage and dealt with his medical condition. (Tr. at 174.)

Monday, March 1, 1999

Kester testified that he had a conversation with Gill in Gill's office on March 1, 1999 when no one else was present in the room. (Tr. at 174-175, 516.) According to Kester, Gill indicated that Gill would be fired for the falsification incidents because it was his "second time." (Tr. at 175.) Gill was the head of access authorization during an earlier incident where the NRC fined the company \$55,000 for failures within the department. (Tr. at 175.) The NRC also found that CP&L had committed a level three violation. (Tr. at 227.) Kester stated, "[a]nd [Gill] told me, he said he offered to resign, told Bill Johnson he would resign. And I think he indicated Bill Johnson said that was premature." (Tr. at 175.) Gill testified that he accepted full responsibility for the falsification event by offering his resignation to Johnson. (Tr. at 410.) He remembered sharing his offer to resign with Kester; however, he did not remember saying "this is the second time for me." (Tr. at 516.) The court notes that the failure to remember does not constitute a denial.

Friday, March 5, 1999

On Friday, March 5th, Kester met with Gill in the conference room beside Gill's office. (Tr. at 177.) According to Kester, Gill stated that he had received an anonymous complaint through interoffice mail expressing concerns about the access authorization department. (Tr. at 369.) Gill later

testified that he received the complaint around the time period of February 5th to February 8th. (Tr. at 457.) The note stated:

The Access Authorization Section, Corporate Security has hired four new Senior Support Analysts and one Support Analyst during this past year. One is leaving this month for another position within CP&L and three others are looking to leave the Section, within or outside of CP&L. A Supervisor hired this past year is extremely frustrated and may leave CP&L.

There is something wrong with this picture.

If it were not for our professionalism, team spirit and internal support group morale would be at an all-time low.

(Rx. 1.) The anonymous complainant requested outside intervention to interview the employees of the section. (Rx. 1.) Kester stated that Gill did not allow him to review the note. (Tr. at 178-179.)

At that time, Gill notified Kester that he had interviewed Kester's subordinates individually to investigate the anonymous allegation. (Tr. at 179, 371.) Gill stated that he began interviewing people on Sunday, February 7th, to determine the validity of the complaint. (Tr. at 179, 372, 477.) Gill maintained that an investigation into the morale of Kester's group was consistent with his managerial responsibilities. (Tr. at 372.) Shawn Nix testified that "[i]t's ordinary for a manager to look into issues within his own department. They may or may not contact Human Resources when they do the initial review or even after they've completed it. It just depends on the circumstances." (Tr. at 762-763.)

This complaint was never submitted to the employee concerns department. (Tr. at 676.) Terry Morton, the manager of the employee concerns department, stated that if his department had received the anonymous complaint requesting outside intervention, then an employee concerns representative probably would have investigated the complaint or at least been a part of the investigation. (Tr. at 644.) Morton stated that someone other than Gill probably should have investigated the complaint because of the request for outside intervention. (Tr. at 646.)

Gill denied that he undertook the interviews in response to the falsification events and stated that he "bought into the decisions Rich made through the event. [Gill] felt it was handled the way it needed to be handled at the time." (Tr. at 372-373.) At the hearing, Gill testified that he postponed telling Kester about the interviews because he wanted to give Kester time to focus on his medical problems. (Tr. at 384.)

According to Kester, Gill compiled a "laundry list" of negative comments that employees had made about Kester. (Tr. at 179; Cx. 89; Rx. 3.) Although Gill would not provide a copy of the list at the March 5th meeting, he did allow Kester to read the list which consisted of two pages of bulleted comments. (Tr. at 179; Cx. 89.) According to Kester, Gill indicated that there had been no positive feedback from Kester's subordinates. (Tr. at 179-180.) Gill testified to the contrary that he mentioned positive comments to Kester, which were included on an agenda that he drafted in advance of the meeting. (Tr. at 507, 510; Rx. 3.) During discovery, Kester received Gill's handwritten interview notes

that included favorable comments. Kester stated that Gill did not disclose those comments when he met with Kester initially. (Tr. at 205; Cx. 73.)

At their March 5th meeting, Kester stated that it looked like Gill was conducting a witch hunt. (Tr. at 180, 385.) He wanted to know if Gill prefaced the interviews by mentioning the anonymous complaint and asking for a negative critique of Kester's management style. (Tr. at 180.) According to Kester, Gill maintained that he provided no preface to the conversation and just called the people into his office for a casual conversation and general feedback on how things were going in the organization. (Tr. at 180, 371-372.)

Gill testified that the summary he compiled entitled "Interview Comments" did not contain any favorable comments about Kester because he wanted to "capture the areas of opportunity for Rich [to improve]." (Tr. at 478-479, 484; Cx. 89.) Gill later provided this summary of interview comments to Shawn Nix and Bill Johnson. (Tr. at 479, 484.) Although Gill indicated at one point that his summary report of the interviews included positive remarks, the document does not reflect any positive statements. (Tr. at 483; Rx. 3.) Gill did not provide his handwritten notes, which included positive comments, to either Johnson or Nix. (Tr. at 487.) Gill stated that he relayed the positive comments about Kester's performance to Human Resources in person. (Tr. at 486.) Nix testified that Gill mentioned positive aspects of Kester's performance, such as his trustworthiness, dedication and knowledge, throughout his discussions with her and Bill Johnson. (Tr. at 769.)

Kester testified that some of the negative comments "appeared on the surface to be absurd" and he found the criticism suspect. (Tr. at 306-307.) Kester stated that his management style had serve him well for thirty years and that he never had those kinds of statements made about him before. (Tr. at 306-307.) He acknowledged, however, that there was always room for improvement. (Tr. at 306.)

Gill never told Kester which employees made the negative comments, which meant Kester could not specifically respond to the remarks.²¹ (Tr. at 203-204, 494-495; see Cx. 89.) Kester indicated that he had recently given some employees, including Bobby Pope, bad performance reviews. (Tr. at 203-205, 463.) Pat Jones, another department employee, was upset by a warning letter that she received in December 1998. (Tr. at 464.) Two employees in the fitness for duty section, Miriam Smith and Cindy Cunningham, had personality clashes. (Tr. at 464-465.) Smith received a poor performance evaluation in January 1999. (Tr. at 465.) It is unclear whether some of the negative remarks were the product of disgruntled employees unhappy with their evaluations.

Gill testified that Kester told him that he "did not think he could recover if so many employees expressed concern. He asked [Gill] about being removed, transferred or being terminated. And he was concerned over whether he could adjust or change as a result of the feedback." (Tr. at 386.) Gill testified that he told Kester that they could work through these issues as long as they had a plan to address the employee concerns. (Tr. at 386.)

²¹Ironically, some negative criticism focused on Kester's lack of communication skills. (Tr. at 204.) However, CP&L had praised Kester's communication skills on recent performance evaluations. (Tr. at 204.)

Kester testified that Gill stated that only he, the people interviewed, and Kester knew about the interviews. (Tr. at 180-181.) According to Kester, Gill said:

we can take care of these, this perception. We can fix this working together, you and me, just like we always had in the past. I said, “you mean nobody knows about this, but you and me.” He said yeah....I said nobody knows about it, so you went off on your own and did these. And he said, “I done it because of the anonymous allegations from Harris Plant,” and he said, “you need to improve your attitude, correct your attitude.” I said, “correct my attitude?” The attitude towards me and towards the job.

I said, “Bob, does this have anything to do with the NRC inspection coming up here next week.” He said, “well now that you mention it, you can change your attitude. What you can do is change your attitude by telling the NRC that you are the only management responsible, the decisions made as a result of the falsification incident, and no other management was involved.”

(Tr. at 181.) According to Kester, Gill stated that he would give Kester the weekend to think about it and he allowed Kester to leave early that day. (Tr. at 181.) Gill denied telling Kester that he could start his improvement by telling the NRC that he alone was responsible for management errors during the falsification event. (Tr. at 506.)

Gill testified that he asked Kester to provide a written plan to address his performance issues on Monday, March 8th. (Tr. at 393.) He stated, “[i]t was a serious conversation I had with him. I wanted him to take it serious. I could see that he was upset. And I wanted to give him time off to reflect on what we had talked about, and to begin creating a plan.” (Tr. at 395.) He also stated that it was his expectation that Kester would show up Monday with a plan. (Tr. at 395.) Kester did not provide a plan to Gill on Monday, March 8th.²² (Tr. at 396.)

Kester stated that Gill did not give him a deadline for the submission of the performance plan (Tr. at 180, 188.) He testified that Gill normally sent an e-mail showing a due date if he wanted something done by a particular date; however, Kester never received an e-mail stating that Gill wanted the performance plan by a particular date. (Tr. at 353.) According to Kester, Gill never gave him a deadline for submission of the performance plan. (Tr. at 188.)

²²Gill stated that he recorded his discussions with Kester, including deadlines for the submission of a performance plan, in a writing he made soon after the March 5th meeting. (Tr. at 513; Rx. 4.) However, he did not remember giving this document to Shawn Nix, Bill Johnson, or anyone else at CP&L. (Tr. at 513.) No objective proof exists to determine when Gill created the document and whether it is an accurate reflection of the March 5th meeting.

Gill wrote out a script that he intended to use to brief access authorization personnel after the conclusion of his interviews. (Tr. at 510-511; Rx. 3.) According to the script, Gill planned to address Kester's performance in the following manner:

Although I cannot share the details of my discussion with Rich,
there are some specific things that you should notice upon his
return:

Communication Style Improvements
Weekly staff meetings
Clear and concise
Include input of section personnel
With the sites
Clear Accountability/understanding FFD

Abrasive language discontinued.

(Rx. 3.) Gill stated that he thought Kester would have captured these areas of improvement in his performance plan. (Tr. at 511.) Although Gill could have informed Kester in writing of the issues he wanted addressed in the action plan, Gill testified that his "preference was for Rich to accept accountability for comments [Gill] received, and to provide resolution in words, rather than [Gill] do that for him." (Tr. at 512.)

Prior to the beginning of March, Gill did not indicate to Kester that he or the company had problems with Kester's performance, that he was conducting interviews with Kester's subordinates, or that dissent existed in Kester's department. (Tr. at 176.) In a typed report that he prepared after the employee interviews, Gill documented Kester's on-going problems with procedure extensions, his unavailability after hours, and his nonresponsiveness to telephone pages.²³ (Tr. at 379-380, 390-391; Rx. 3.) Gill testified that Kester's performance problems began in late 1998 and early 1999. (Tr. at 392.)

Nix testified that she discussed the results of the employee interviews with Gill before he talked to Kester about the performance plan. (Tr. at 763; Rx. 3.) Nix did not know about the employee interviews until after their completion. (Tr. at 775.) She testified that she and Gill reviewed the results of the interviews and decided that Gill would discuss the results with Kester and request that Kester develop a plan of action to address the issues, take accountability for the situation, and move forward. (Tr. at 763.) Nix advised Gill to give Kester specific deadlines for the plan. (Tr. at 766.)

After his meeting with Kester, Gill indicated to Nix that he did not feel that Kester had been open to a discussion about the employee interviews. (Tr. at 766.) However, he and Kester had talked through a plan of action. (Tr. at 766.) Gill told Nix that he had given Kester an extension of time when

²³Gill noted Kester's failure to respond to his requests to accomplish certain tasks, such as providing a plan for the employment background investigations and renewing an agreement to provide services on respirator fits at the Harris plant. (Tr. at 367.)

Kester had not completed the plan by the due date. (Tr. at 766-767.) Gill later informed Nix that Kester had stated: “I am not doing a plan of action, I have more important things to do, this is not my priority, some day you’ll understand what priorities need to be, and I’m not going to do one.” (Tr. at 767.)

On Friday afternoon, March 5th, Kester contacted Alan Britton, the superintendent of security at the Brunswick plant, to discuss what he ought to do about Gill’s statements. (Tr. at 182-183.) Kester testified, “Gill had these secret interviews he was conducting and he was willing for me and him to work on them with no outside involvement, as long as I would tell the NRC that I was the only one involved. And I thought it was blackmail.” (Tr. at 182.) Kester stated that he was not the only management involved in the falsification incident. (Tr. at 182.) Bob Gill and Bobby Pope also made management decisions. (Tr. at 182.)

Britton recommended reporting the conversation to someone. (Tr. at 182-183.) He suggested reporting it to the person who handles employee concerns at the Harris plant. (Tr. at 183.) Kester hesitated to report it to that person because the person’s wife worked for Kester in the access authorization department. (Tr. at 183.) Britton stated that he would find out who Kester should contact at the corporate office and call Kester with the information on Monday morning. (Tr. at 183.) At the hearing, Britton could not recall the specifics of his conversation with Kester; however, he remembered that Kester had been concerned about a conversation that he had with Bob Gill. (Tr. at 871.) Britton testified, “I remember having the conversation [with Kester]. And I thought it was important enough that he should take it to the employee concerns people.” (Tr. at 874.)

Monday, March 8, 1999

On Monday morning, March 8th, Britton phoned Kester and stated that Kester needed to contact Terry Morton, the manager for the performance evaluation regulatory affairs group at CP&L. (Tr. at 183-184, 564.) Kester testified that he met John Caves, a supervisor for NRC regulatory affairs under Morton’s supervision, in the hallway near Morton’s office.²⁴ (Tr. at 184, 626.) According to Kester, Caves asked if he could assist him and Kester stated that he had an employee concern to discuss with Morton. (Tr. at 184-185.) Caves testified that he and Kester spoke for twenty minutes in his office before Morton was available to meet with Kester; Kester, on the other hand, testified that he and Caves waited and talked in the hall for between five and ten minutes before Kester met with Morton. (Tr. at 703, 878.) According to Kester, Caves asked if he could also attend the meeting with Morton and Kester agreed. (Tr. at 185.) Kester testified that he told them that:

Bob Gill was trying to— said, he wants me to lie to the
Nuclear Regulatory Commission. He wants me to tell them

²⁴Caves testified that Kester came directly to his office because he believed he was being asked to accept responsibility for certain actions associated with the falsification events. (Tr. at 702.) According to Caves, Kester approached him because he wanted to “understand expectations of him for the organization’s perspective in terms of any interaction with the Nuclear Regulatory Commission.” (Tr. at 702.) Caves also stated that Kester wanted to know what forms of “protection” would be available to him within the program. (Tr. at 702.)

that I was the only management that made any decisions resulting in the falsification investigation. I was the only one in management that made any decisions, and no other management was involved. And I said, “that’s a lie.”

And I told them that I wasn’t here on Thursday, nor Friday. I wasn’t in the office when things should have happened and didn’t happen. And I said now he’s held—he’s told me he’s held interviews with thirteen of my people and he’s going to use the negative information he got from those interviews. He’s going to use it against me, unless I tell the NRC that I was the only management that made any decisions related to the falsification incident.

(Tr. at 185-186.) Kester asked Morton and Caves to keep their meeting confidential. (Tr. at 186.) According to Kester, they stated that upper management²⁵ would have to know about his concern, but their meeting would be kept confidential from Bob Gill. (Tr. at 186-187.)

Morton suggested that Kester talk to the employee concerns person at the Brunswick plant if he wanted to follow up with his complaint.²⁶ (Tr. at 186.) Kester testified that he told Morton and Caves that he would not have time because he had to finish preparing for a scheduled outage and then he would be on a medical leave of absence starting on March 24th. (Tr. at 186.) According to Kester, Morton stated: “well, I’d just like to give you this number in case, just in case you want to do something, more follow up with it.” (Tr. at 186.) Kester responded by reiterating that he did not think he would have time to follow up with the Brunswick person. (Tr. at 186.)

Kester expected Morton to conduct an investigation and talk to senior management. (Tr. at 186.) He also thought someone would discuss with him his version of events. (Tr. at 186-187.) However, no one ever spoke to him about the incident. (Tr. at 187.) According to Kester, Morton did not ask him to fill out any forms or submit a complaint in writing. (Tr. at 187.) Kester stated that Morton never indicated that Kester needed to do something more prior to Morton bringing up the concern with senior management. (Tr. at 187.) Kester testified, in fact, that Morton stated that he needed to discuss Kester’s complaint with senior management in order to investigate it. (Tr. at 187.)

Morton remembered that Kester “had mentioned during that conversation that since he wasn’t there when some activities [related to the falsification event] were supposedly taking place, he was concerned that he might be blamed for some problems that may occur in the future related to those activities.” (Tr. at 566.) He did not remember Kester stating that Gill conducted secret interviews of

²⁵Terry Morton reports to Scotty Hinnant, a senior vice-president and the chief nuclear officer at CP&L. (Tr. at 620-621.)

²⁶Morton does not handle individual employee complaints despite the fact the he manages the employee concerns division. (Tr. at 601.) He stated that he is not a qualified employee concerns representative. Id.

Kester's employees. (Tr. at 608.) He also did not remember Kester stating that Gill asked him to lie to the NRC. In fact, Morton did not remember any discussion about the NRC specifically. (Tr. at 566, 593, 704; Cx. 117.) According to Morton, Kester "did not express any opinion that he might be retaliated against for telling the truth about the incident to [the NRC.]" (Cx. 117.) He testified that his department would have offered to investigate Kester's concerns if Kester had stated that Gill wanted him to lie to the NRC. (Tr. at 600.) Morton testified that his group handles issues dealing with nuclear safety. (Tr. at 676.) He knew that the NRC planned an investigation at CP&L for the following week. (Tr. at 588.)

Caves stated that he remembered discussing the upcoming NRC investigation with Kester. (Tr. at 713.) According to Caves, Kester stated that Gill wanted Kester to take responsibility for Kester's actions. (Tr. at 713; Cx. 121.) Caves stated that Kester implied that Gill shared the responsibility for the falsification event. (Tr. at 711.) Caves testified that

Mr. Kester [was] being asked to be honest about a role that he played in an event that other people are going to consider as negative regarding his performance, and he's uncomfortable about how that could potentially impact him.

(Tr. at 717.) Caves denied that Kester stated that Gill wanted him to take full responsibility for the situation or that Gill wanted Kester to lie to the NRC and state that he was the sole management involved with the falsification event. (Tr. at 711.)

Morton testified that he "asked [Kester] if there was anything that he would like the employee concerns organization to look at or investigate for him, since he seemed to have some concern about some future blame on those activities." (Tr. at 566; Cx. 117.) According to Morton, Kester stated that "he didn't really have anything that he'd like to have investigated." (Tr. at 566.) Morton testified that they

encouraged him that if he had anything that he would like to share, he could have one of the other employee concerns reps, specifically the one at Brunswick, Mr. Kirks, he could either call him, or we'd be glad to have Mr. Kirks get in touch with him, too, if he had anything to share at that time or at any time in the future, also.

(Tr. at 568.) Morton did not consider Kester's statement to be an official employee concern; therefore, he did not take notes at the meeting. (Tr. at 687-688.) Caves did not take notes at the meeting either.²⁷ (Tr. at 706.)

Morton did not remember Kester asking him to keep the conversation confidential; however,

²⁷Morton testified that if he had received a complaint dealing with a purely personnel issue, then he would have referred the complainant to Human Resources or to the appropriate management. (Tr. at 676.)

he maintained that he did not report this conversation to Bill Johnson or Scotty Hinnant. (Tr. at 563, 569, 591; Cx. 123.) Caves testified that he understood that Kester wanted the conversation to be kept confidential. (Tr. at 709; Cx. 121.) He testified that he did not report the conversation to Robert Gill or Bill Johnson or discuss the meeting with anyone except Terry Morton. (Tr. at 705; Cx. 121.)

Kester spoke with Gill again later on Monday, March 8th. (Tr. at 188.) At that time, Gill provided Kester with a copy of the negative feedback he had garnered from the interviews with Kester's subordinates. (Tr. at 188; Cx. 89.) Gill did not provide his handwritten notes made during the interview process. (Tr. at 205; Rx. 2.) According to Kester, Gill indicated that he wanted Kester to make progress on the action plan. (Tr. at 308.)

Kester testified that he made notes about where he needed improvement in his management style during their March 8th meeting. (Tr. at 188.) Gill testified that Kester "again challenged the process of questioning, why I responded to anonymous allegations. He did not believe that I should have talked to his employees. He commented on multiple occasions that he had lost trust in me, and also commented that his managerial style had been effective since 1962, and in his opinion continued to be effective." (Tr. at 396-397.)

Gill stated that he gave Kester a one week extension to provide the plan and that it would be due by March 15th. (Tr. at 398.) He testified that he gave Kester an extension to provide him the opportunity to reflect on the issues and "to accept ownership and accountability" by developing a performance plan. (Tr. at 398.) Kester stated that Gill did not provide a deadline to him. (Tr. at 188.) Kester later enrolled in two training courses and sent Gill an e-mail notification of his enrollment. (Tr. at 308.) Gill indicated that the enrollment was a start, but it was not sufficient to complete Kester's performance plan. (Tr. at 308.)

Kester testified that Gill received a phone call from Bill Johnson, a vice-president and Gill's supervisor, during their March 8th meeting and, afterwards, he told Kester that the rest of their meeting needed to be postponed. (Tr. at 189.) At the point, Gill left their meeting. Kester assumed that Gill left the meeting to go to Johnson's office. (Tr. at 189.)

Tuesday, March 9, 1999

Kester did not speak to Gill again until early the next morning, Tuesday, March 9th. (Tr. at 192.) Kester testified that Gill seemed nervous. (Tr. at 882.) Gill asked him if he had discussed "what [they] talked about Friday" with someone outside of the department. (Tr. at 192, 883.) Kester answered in the affirmative.²⁸ (Tr. at 192.) He told Gill that he felt that he needed protection. (Tr. at 518, 883.) According to Kester, Gill stated that he had talked to Bill Johnson and Kester could tell the NRC anything that he wanted to tell them. (Tr. at 192.)

At that point, Kester "felt icicles around [his] heart" because his conversation with Caves and Morton had not remained confidential for twenty-four hours. (Tr. at 193.) Even though Morton

²⁸Gill did not remember this discussion; however, he testified that another employee had notified him that Kester was meeting with John Caves. (Tr. at 518-519.)

indicated that he would have to tell upper management, Kester had expected that the conversation would be kept confidential from Gill. (Tr. at 193-194.) Kester stated that Bill Johnson “was apparently informed of my whistle blower complaint and relayed the complaint to Bob Gill the evening of March 8th as Bob Gill confronted me about my complaint on the morning of March 9, 1999.” (Rx. 6.)

Wednesday, March 10, 1999

On March 10th, David Thompson, a NRC Region Two Security Inspector, visited the corporate headquarters. (Tr. at 194-195.) Thompson inspects the log entry books and investigates reports of irregularities at the nuclear plants. (Tr. at 195.) Kester briefly spoke to Thompson on March 10th. (Tr. at 194.) Later, Kester had an interview with Thompson when Thompson visited the Harris plant for an inspection. (Tr. at 194.) Thompson reviewed various items involved in the falsification incidents and the aftermath. (Tr. at 194.)

Kester stated that he spoke truthfully with the NRC. (Tr. at 195.) No one asked him any questions about Gill’s statement that Kester ought to take sole blame. (Tr. at 195.) He also did not volunteer any information about Gill trying to blackmail him into taking sole blame. (Tr. at 195.) He considered the issue an in-house matter and he felt uncomfortable “going outside the company telling the NRC something that [he] thought – [he] still thought the company would take care of it.” (Tr. at 196.) Kester stated that he had respect for the company’s chain of command. (Tr. at 196.)

Friday, March 19, 1999

On March 19, 1999, Kester issued another condition report about the falsification incidents. (Tr. at 196; Cx. 61.) The report indicated that the access authorization department trained Rebecca Johnson as a background investigator without having her sign a training roster. (Tr. at 197.) Kester initiated this condition report because Thompson had informed Kester that the failure to sign a training roster constituted a violation. (Tr. at 197.)

Monday, March 22, 1999

Gill testified that he and Kester had a regularly scheduled meeting on March 22nd and Gill again asked Kester about the action plan. (Tr. at 400-401.) According to Gill, “Rich indicated...that he had not prepared the plan. He stated that he had signed up for some classes, but had not had time to complete the plan. He continued saying...that he had more important things to do, and was more concerned with his upcoming medical leave.” (Tr. at 401.) Gill did not perceive Kester to be accepting of the criticism of him and willing to change his managerial style to address the criticism. (Tr. at 402.) Unbeknownst to Kester, both Bill Johnson and Shawn Nix were concerned that Kester had not provided a plan to Gill. (Tr. at 402, 522-523.)

Wednesday, March 24, 1999

Kester worked on March 24th prior to the start of his medical leave. (Tr. at 197-198; Cx. 98.) On that day, Gill and Kester discussed Kester’s pay raise. (Tr. at 198.) Gill notified Kester that, due to his excellent performance, Kester would receive a four percent pay increase. (Tr. at 198.) Kester

testified:

he asked me if I was aware that less than that was the norm for that year. And I said yes, I was. You know, I had to do my own other, my subordinates' salary increases. And I think it was, as I recall, something like in the three percent range was the norm. And I told him that I would certainly have plenty of time to work on this performance, this plan that we had discussed during my absence. He said don't worry about it.

(Tr. at 198-199.) Gill stated that Kester should just worry about getting well and that he and Kester could work on the plan when Kester returned from medical leave. (Tr. at 199.) Gill testified that he did not expect Kester to work on the action plan while on medical leave. (Tr. at 403.) Gill did not mention to Bill Johnson or Shawn Nix that he told Kester that he would have time to work on the performance plan after he returned from medical leave. (Tr. at 526, 787-788, 858-859.)

Kester told Gill that he had trouble working on the plan because of other obligations, including assisting with the NRC inspection and preparing for the Brunswick outage. (Tr. at 200.) CP&L alleges that Kester refused to submit to a performance development plan and that Kester was insubordinate when asked to do a plan. (Tr. at 199.) Kester denies both allegations. (Tr. at 199.)

Thursday, March 25, 1999

On March 25, 1999, Ms. Newsome initiated a condition report regarding the destruction of the certification letters. (Cx. 63; Tr. at 210.) Newsome issued another condition report on March 25th with regard to the falsification event and the failure to stop access by using the CATS database. (Tr. at 210; Cx. 65.) CP&L did internal investigations of those reports and issued root cause evaluations. (Tr. at 210; Cx. 64, 66.) The company also issued a root cause evaluation that addressed all of the condition reports dealing with the falsification event. (Tr. at 211; Cx. 67.)

Medical Leave

Wednesday, March 24, 1999 through April 25, 1999

Kester took medical leave starting on March 24, 1999 to undergo surgery. (Tr. at 212.) Bob Gill notified him at home that the company was doing the root cause evaluations. (Tr. at 212-213.) Gill asked if Kester wanted any input into the process. (Tr. at 213.) Kester testified:

And I said certainly, they're significant adverse condition reports. I said well, I said soon as I get back, we can go ahead and start on them. He said no, we've got a deadline here. If you want input, you're going to have to do it in the next so many days. I said wow. I was in no condition to do it. But I didn't tell him that. I said I would do my best.

(Tr. at 213.) According to Kester, he received drafts of the reports at home and he attempted to provide feedback via his laptop computer. (Tr. at 213.) He stated that he had to take a lot of medication in an attempt to counteract the pain that he felt in trying to work at the computer. (Tr. at 213.) Although he felt “foggy on some things,” he noted that one of Robin Newsome’s drafts included a lot of false information. (Tr. at 213.) He sent an e-mail that identified the information as false and he stated that the plant nuclear safety committee would “see right through that.” (Tr. at 213.) Gill then called him and stated that he and Newsome needed to negotiate and work it out. (Tr. at 214.)

At some point, Kester started bleeding where he had been stapled during the surgery. (Tr. at 214.) He talked to a nurse who stated that if Kester moved around too much, he could cause a hiatal hernia, which would require an operation to correct. (Tr. at 214.) Kester made the decision not to do any more work while on medical leave. (Tr. at 214.) When Newsome telephoned him that afternoon, he told her “fine, whatever.” (Tr. at 214.) He “said if they can’t wait until I get back, they’ll have to—that’s all the input I can give. I don’t feel up to it. That’s it.” (Tr. at 214.)

During Kester’s medical leave, Nix, Gill, and Johnson discussed Kester’s continued employment. (Tr. at 767). According to Nix, Gill initially wanted to transfer Kester to another position within the company. (Tr. at 768.) Nix did not consider a transfer to be a viable option. (Tr. at 768.) She strongly recommended that CP&L terminate Kester based on his insubordinate refusal to do a performance plan. (Tr. at 768.) Her recommendation was based solely on Bob Gill’s statements to her. (Tr. at 783-784.) She did not know that Gill had extended the time for Kester to submit a performance plan to be due after he returned from medical leave. (Tr. at 787-788.) She never spoke directly with Kester about his refusal to complete a plan. (Tr. at 783-784.) She never conducted any interviews in access authorization about Kester’s performance. (Tr. at 786.) She also did not know that Gill was “in charge” on February 5, 1999, when CP&L discovered that a worker had been badged for access based on the falsified background investigation. (Tr. at 786.)

Nix stated that Bill Johnson made the ultimate decision to terminate Kester based on her strong recommendation. (Tr. at 769.) Nix testified that they never discussed the fact that Kester spoke to Morton and Caves. (Tr. at 769.) She was unfamiliar with their names. (Tr. at 769.) Bill Johnson agreed with Nix’s assessment that Kester should be terminated. (Tr. at 768.)

Johnson stated:

I concluded that [Kester] had to go for various reasons. First, the employee survey process is an important management tool and we take the results very seriously. The results, the concerns voiced by employees, indicated that Mr. Kester was not working out as a superintendent. Second, when informed of his performance problems, Mr. Kester’s reaction was to ignore them. He refused to take any actions to correct his performance. He came close to termination based on this conduct alone. Finally, I am not satisfied with his performance with regard to the falsification of records event.

(Cx. 148, p.2.) Johnson later testified that he would never have terminated Kester based solely on his

conversation with Cindy Johnson regarding the poor employee survey results for the access authorization department. (Tr. at 823.)

At the hearing, Johnson stated that Kester's "refusal to improve [his] performance was a key part of [Johnson's] decision to terminate." (Tr. at 856.) However, he was unaware that Kester had enrolled in two management seminars. (Tr. at 850.) He also did not know that Gill had extended the time for Kester to submit a performance plan to be due after he returned from medical leave.²⁹ (Tr. at 858-859.)

Johnson testified that Gill had characterized the falsification event in the following manner:

Mr. Gill said that there had been some errors made during that whole process, but he thought it could be explained to the NRC without much problem or difficulty. He didn't think it was a significant event...But he also told me at the same time that the nuclear people at our company, the people to whom it was reported to at the sites had a much different view of it, they thought it was a serious event....

(Tr. at 800.) Johnson believed that this conversation occurred shortly after the sites were notified of the falsification, which would have been during the week of February 8, 1999. (Tr. at 825.)

Johnson later talked to the two top nuclear executives, including Scotty Hinnant, who were very upset about the falsification incidents. (Tr. at 800, 830.) Johnson testified: "[m]y impression from speaking with them was that they were thinking this was going to be a bad event with the NRC, that we would get cited for violations, that we had the potential for a civil penalty. Part of the reason they were so upset was there was sort of a track record of these access authorization events happening." (Tr. at 802.) After Johnson spoke to Dave Thompson, the NRC inspector, he had the impression that the inspector believed that the problems surrounding the falsification event resulted from poor judgment by management in applying policies and procedures. (Tr. at 815.)

Johnson met again with Gill and discussed the falsification event in detail. (Tr. at 803-804.) He stated that "Mr. Gill was very cooperative. He understood at this point how seriously [Johnson] was taking it. And in fact, he offered to resign from the company over this event at that meeting." (Tr. at 804.) Johnson felt that Gill took responsibility for the event considering that it occurred in Gill's organization "under his watch." (Tr. at 804.)

²⁹In his notes of his March 22nd meeting with Kester, Gill indicated that he "advised Rich that upon his return to work [they] would focus on his plan to address items of concern discussed March 5." (Cx. 102.) Johnson stated that he interpreted this comment to mean: "Mr. Gill knew that [Johnson and he] didn't have an answer, [they] didn't know what was going to happen, and so...[Kester has] to have a medical leave...we'll deal with this when you get back." (Tr. at 789.) Johnson did not remember Gill indicating to him that Gill had told Kester that he would be allowed to create a plan after his medical leave. (Tr. at 790.)

When Johnson spoke to Scotty Hinnant, the chief nuclear officer, about the event, Hinnant “lit into [Johnson]...about the need to keep this from happening again.” (Tr. at 804.) According to Johnson, Hinnant said: “I have lost confidence in access authorization and I don’t ever want this episode to happen again.” (Tr. at 805.) Johnson stated that the conversation with Hinnant occurred in mid-February. (Tr. at 805.)

At that point, Johnson consider two options for dealing with access authorization. (Tr. at 807.) He considered terminating the people involved with this event. (Tr. at 807.) Johnson testified: “I thought a while about terminating both Gill and Kester over this event, because I wasn’t particularly happy with the way either one of them had approached it.” (Tr. at 807.) He also considered trying

to improve the performance of access authorization, see if the people involved in this wanted to improve their performance and the performance of the organization, and that’s the option that I chose. I thought it was a little maybe premature to draw that harsh a conclusion about termination at that time. We could work on performance. We could see what the NRC investigation turned up. And we could see if the access authorization people were interested in improving their performance.

(Tr. at 807.) He stated that he and Bob Gill met on a weekly basis to discuss his concerns with management in access authorization. (Tr. at 808.) They discussed the employee survey results, the falsification episode, Gill’s performance, Kester’s performance, and the general performance of the section. (Tr. at 808-809.)

Johnson testified:

I knew Mr. Gill was doing interviews already in the section about Mr. Kester’s management style. And so I decided I would let him continue this process and see what turned up. I thought this would be a good experience for Mr. Gill because one of the things I thought he needed to improve on was performance management....When he’s done with the interviews, we will get together and talk about what the next steps are, and how we’re going to improve Mr. Kester’s performance. With Mr. Gill, I decided I would take a direct approach with him, coaching him and speaking with him directly about his performance and things he could do better.

(Tr. at 809.) Johnson testified that Gill was quite receptive to negative feedback and he showed a desire to improve his performance. (Tr. at 810-811.)

Johnson stated that Gill “reported that when he approached Kester about [the performance

plan] and told him some of the comments and results [of the employee interviews], Kester sort of rejected the interview process, rejected the conclusions and basically concluded he did not need to improve his performance.” (Tr. at 811.) Johnson was not pleased with Kester’s response and directed Gill to try again to gain Kester’s cooperation. (Tr. at 812.) Gill reported to Johnson that Kester thought his performance was okay. (Tr. at 812.) Johnson stated that Kester’s response was inappropriate borderline insubordination. (Tr. at 812.) He stated that Gill’s second failed attempt to gain Kester’s participation in a performance plan occurred shortly before Kester went on medical leave. (Tr. at 813.) Johnson testified that he never attempted to interview Kester directly about what happened with the falsification event. (Tr. at 831-832.)

At that point, Johnson leaned strongly towards terminating Kester. (Tr. at 817.) Johnson testified:

[w]ell when it came time for Mr. Kester to come back, we started meeting, you know, some period of time in advance of that to discuss what we were going to do. And the options were we were going to keep him and work with him to improve performance, or we were going to terminate him. And during this process I decided that we needed to terminate him.

It really came down to the performance and the falsification event, and then the lack of interest in improving performance after that event, despite given several chances to do so.

(Tr. at 817.) When he decided to terminate Kester, he was unaware that Kester had spoken to Morton and Caves. (Tr. at 820.) Johnson stated that Gill initially did not want to terminate Kester. (Tr. at 818.) According to Johnson, Gill wanted to continue to work with Kester to improve his performance or try to find Kester another position in the company. (Tr. at 818.) After considering all options, Johnson decided that Kester needed to be terminated. (Tr. at 818.)

Johnson testified that he considered terminating Gill. (Tr. at 818-819.) By mid-February, Gill was aware that Johnson might terminate him. (Tr. at 845.) However, he decided against it because:

Mr. Gill had shown during the process a desire to improve, to improve the performance of the section, to improve access authorization. He was cooperative and helpful at every turn. He took responsibility for whatever outcome of the falsification event was....So I thought his demeanor, his approach, his performance indicated that we should continue to work to improve his performance.

(Tr. at 819.) As a result of Gill’s involvement in this event, he lost the opportunity for a promotion, received a negative performance evaluation, and did not receive as much of a raise as he might have in the absence of the event. (Tr. at 820.)

Termination

Monday, April 26, 1999

Dr. Stermon, Kester's surgeon, provided Kester with a "return to work" note and Kester reported for work on the morning of April 26, 1999. (Tr. at 215; Cx. 103.) On his first day back to work, Gill told Kester that his employment was terminated. (Tr. at 216.) He stated Kester would be on administrative leave and the company would pay him through May 18th, which would be the effective day of his termination. (Tr. at 216-217.)

About why he was terminated, Kester testified:

[Gill] said about on the—March— whenever he told me about the interviews and so forth, I had remarked to him that he's caused me to lose a lot of credibility with the people he interviewed. I said any type of personnel action I should take for any reason, any type of disciplinary action in the near future, they're going to say it's because they gave you statements, negative statements about me. This goes a great deal— does a great deal to hurt my credibility as being a professional.

(Tr. at 216.) Gill stated that he agreed with Kester and believed that Kester would be unable to manage or would be ineffective in managing the access authorization organization. (Tr. at 524.) Gill believed that Kester could not recover from the employee concerns. (Cx. 105.) When Kester asked Gill who made the decision to terminate him, Gill stated that it was his decision alone. (Tr. at 218.) At that point, Shawn Nix came into Gill's office and gave Kester a general release and severance agreement. (Tr. at 218; Cx. 107.) Kester did not sign or agree to the general release which stated that he released his rights to bring claims and litigation against the company. (Tr. at 218; Cx. 107.) On the same day, Kester sent a letter to the United States Department of Labor, OSHA division, that initiated the present claim. (Tr. at 354.)

NRC Investigation Results

During discovery, Kester learned that the NRC had issued a notice of violation to CP&L as a result of an inspection conducted by David Thompson on March 10, 18, 19 and 25 of 1999. (Tr. at 219; Cx. 137.) According to the NRC, CP&L committed five violations; however, the NRC characterized four out of the five violations as multiple examples of the same problem. (Tr. at 220.)

The first violation addresses Rebecca Johnson's "willful failure...to review and evaluate background investigations for persons granted unescorted access authorization." (Tr. at 220-221.) The company ultimately fired Ms. Johnson for her actions. (Tr. at 221.)

The second violation is "the failure to discontinue temporary unescorted access authorization for three individuals having background investigation records." (Tr. at 221.) The NRC noted that "CP&L

personnel became aware of the inaccurate AA³⁰ records on January 29, 1999 and received confirmation of additional inaccurate information on February 2, 1999.” (Tr. at 248.) No one initiated any action to remove the access authorization for the individuals with the inaccurate background checks until the afternoon of February 3, 1999. (Tr. at 249.) All elements of the individuals’ access authorization were not removed until February 5, 1999. (Tr. at 249.) This failure to remove warranted a level four violation. (Tr. at 250.)

Kester admitted that he was involved with the actions that occurred through February 3rd and that he made the decisions through that date. (Tr. at 250-251.) He stated that he did everything he knew to do to discontinue temporary access. (Tr. at 250-251.) Kester testified that Newsome failed to delete the names from the CAT system, even though she stated to him that she would. (Tr. at 221.) Also, Gill knew and approved of all the actions that Kester initiated through February 3rd. (Tr. at 341-342.) Gill was involved with the actions taken from February 5th onward. (Tr. at 342.) Kester testified that Gill and Newsome share the responsibility for this failure. (Tr. at 342.) The company fired neither Newsome nor Gill. (Tr. at 221.)

The NRC cited the company for a third violation: “the failure to maintain original data upon which unescorted access authorization was granted for five years.” (Tr. at 221.) Kester never denied that he destroyed the original certification letters and told his employees to destroy the faxed copies; however, the department preserved the data and all the forms done incorrectly in the certification files. (Tr. at 221-222.) Kester notified Gill of his actions and Gill stated that Kester’s actions were “fine.” He did not object to the destruction of the certification letters. (Tr. at 222.) Gill never indicated that the situation needed to be reported or logged or that the situation required a condition report. (Tr. at 344.) At some point, a third certification letter was destroyed, but no one knows who destroyed it. (Tr. at 343.) Kester testified that Gill shares the responsibility for the failure to maintain the certification letters. (Tr. at 344.)

The fourth violation constituted: “the failure to appropriately resolve and document safeguards events in the security event logs.” (Tr. at 222.) The NRC faulted the company for the failure to log the events on January 29, 1999, which constituted the first day that access authorization suspected that falsified backgrounds resulted in certifications. (Tr. At 251, 256.) CP&L did not log the events until February 8th and 9th, for the Robinson and Harris plants respectively. (Tr. at 251.)

According to a significant adverse condition evaluation performed by CP&L, David Crook, the supervisor at the Robinson plant, suggested to Kester that a safeguard event log entry might be appropriate for these events on February 4th. (Tr. at 258-259; Cx. 60, 67.) Crook asked whether Scott Young, the superintendent of physical security at the Robinson plant, should be notified to make a log entry. (Tr. at 260.) The report indicates that Kester told Crook that the event was not loggable because none of the individuals had been badged or gained access to the plants. (Tr. at 259; Cx. 60, 67.) Further, it states that Gill had to speak privately with Kester to direct him to initiate a condition report. (Tr. at 259-260; Cx. 67.) Kester, who did not see this report until the discovery process, denied those events. (Tr. at 258-260.) He testified that he never told anyone that log entries should not be made about the falsification event. (Tr. at 334.)

³⁰The court notes that AA is the abbreviation for access authorization.

Kester stated that he reviewed the incident in view of 10 CFR 73.71 and NRC generic letter 9103 to determine whether the incident was reportable. (Tr. at 262; Cx. 60.) Based on his independent review and interpretation, he concluded that there were no criteria for reporting because the workers affected by the falsely completed background investigations had not been badged. (Tr. at 262; Cx. 60.) He testified, "I determined by reviewing those things that a report to the NRC wasn't required. I did not interpret that to say that you shouldn't notify the HNP or RNP³¹ superintendents." (Tr. at 263.)

On Monday, February 8th, Scott Young learned for the first time of the falsification event and sent an e-mail reminding everyone that the site security superintendents needed to be notified of these events.³² (Tr. at 282-283, Rx. 14.) In response to his e-mail, Martha Taylor, an employee in access authorization at the Harris plant, e-mailed Kester and asked if Denny Braun, the site superintendent at the Harris plant, should be similarly notified about the falsification event related to a Harris plant employee so that he could decide about loggability. (Tr. at 283, 286; Rx. 14, 15.) Braun had received a copy of Scott Young's e-mail; however, Young's e-mail did not mention the problem at the Harris plant. (Tr. at 282, 349; Rx. 14.) A special investigation conducted by Morton, the manager of regulatory affairs and the performance evaluation section, determined that Kester initially replied to Taylor that no notification was necessary because the individual at Harris had not been badged. (Tr. at 284-285; Rx. 15.) After further inquiry, according to the report, Kester stated that he would notify Braun on February 9th at a peer group meeting. (Tr. at 286; Rx. 14.)

Kester stated that he did not read Taylor's e-mail until February 9th. (Tr. at 284; Rx. 14.) He does not remember a conversation with Martha Taylor in which she asked about notifying Braun about the event. (Tr. at 287.) He had a pre-scheduled meeting at the Harris plant that morning and he notified Braun about the event then. (Tr. at 284-285.) The report confirms that Kester made Braun, the Harris security superintendent, aware of the incident. (Tr. at 287.) Braun logged the incident on February 9, 1999. (Tr. at 287.)

Kester testified that he wished he had notified the security superintendents on February 4th about the falsification incidents so that they could have made the appropriate log entries. (Tr. at 222.) When asked whether the incidents should have been reported on February 3rd, Kester stated:

When it was determined that there was a problem and when
it was finally reported to Mr. Gill, it was like six thirty, seven

³¹The court notes that RNP is an abbreviation for Robinson Nuclear Plant and HNP is an abbreviation for Harris Nuclear Plant

³²John Ross completed interviews into the falsification events on April 16, 1999, in which he recorded the following comments from Scott Young:

4. He believes there was a conscious decision to keep sites out of loop. But not a cover up.
5. He believes the culture starts at the top.
6. Rich does not make decisions- must have Gill's approval.

(Cx. 104.)

o'clock at night. To report it, you have to, for a log entry, you have to report it to someone. You have twenty-four hours from seven o'clock in the evening-from the evening, there was twenty-four hours later. Did it need to be reported that night at seven o'clock? The answer is I don't think so.

Because there was nobody at the plants working. You'd have to call them at home. And on operational, on shift when there's a problem like that, they don't report it until the next morning when there's a log entry.

(Tr. at 255-256.)

Kester stated that Bob Gill, the senior person in charge at the corporate office, should have been responsible for the failure to notify the security superintendents on February 5th. (Tr. at 222-223.) Kester added:

Even if, let's say on the 4th, I had notified the superintendents that two people had – and so forth, of the things that we knew about on the morning of the 4th, if I had notified the superintendents, on the 5th when a guy got a key card or a badge, the superintendents would've had to be notified again, then made another log entry. It wouldn't have been like one entry on the 4th would have took care of the 5th, also. It would've had to been done again anyway, but it wasn't.

(Tr. at 223.)

According to the final root cause analysis, Newsome asked Gill if the site security superintendents should be notified on February 3rd; however, Gill did not remember that conversation. (Cx. 67, Tr. at 345-346.) He did not call site security when he had the opportunity to do so. (Tr. at 344.) According to Kester, Gill shares the responsibility for the failure to notify the site security superintendents about the loggable event that occurred on February 5th. (Tr. at 344-345.)

The inspection report described an additional violation “associated with the failure to document an individual’s training in accordance with the licensee’s plans and procedures.” (Tr. at 224.) This violation addresses the failure to have Rebecca Johnson sign a training roster. (Tr. at 224.) The NRC ultimately determined that the failure constituted a violation of minor significance and that CP&L should not be subjected to a formal enforcement action. (Tr. at 224.)

The NRC determined that the significance of CP&L’s violations rated a “green finding.”³³ (Tr. at 226.) Due to the failure to restore compliance within a reasonable time, the NRC determined that a notice was warranted for a violation at the Harris facility. (Tr. at 226.) For the actions taken on February 2nd and 3rd, the NRC found a level four security violation, which is the least serious of violations. (Tr. at 226.)

³³The NRC did not assess a fine based on that violation. (Tr. at 553.)

Post-Termination

After he lost his job at CP&L, Kester felt that his professional life was finished. (Tr. at 227.) He stated:

I was fifty-four years old. And at that time of life, I should be looking towards retirement. I was going to have to start all over. I – the stress was unbelievable. I couldn't sleep, couldn't eat. I was supposed to be recovering and I had to seek psychological help so I could cope. I felt this was the end.

(Tr. at 227-228.) He received psychological treatment from Dr. David Norris, a licensed clinical psychologist. (Tr. at 228; Cx. 129.) He attended counseling sessions from August 23, 1999 through November 17, 1999. (Tr. at 243.)

Kester stated that he sent out a hundred to a hundred and fifty resumes prior to receiving a job. (Tr. at 229; Cx. 146.) He submitted many of his resumes via the internet. (Tr. at 243-244.) He did not apply for positions at nuclear power plants because he stated that he would only be considered if he lied on his application. (Tr. at 323.) He testified:

[b]ecause CP&L put on their reason for termination to the Employment Security Commission poor work performance, I would be required to fill out a personal history questionnaire for access to another nuclear power plant. It has on the questionnaire your last employer, reason for leaving your employer. Should I put on there something other than poor work performance, I'm subject to federal prosecution.

(Tr. at 323.) He finally found another job making much less money as a corrections officer with the Department of Corrections. (Tr. at 228.)

When Kester was initially employed by CP&L in September 1996, his salary was \$5,000.00 per month. (Tr. at 230.) On March 26, 1997, he received a one percent merit raise. (Tr. at 230.) On March 26, 1998, Kester received a six percent raise, which constituted his annual raise. (Tr. at 230.) On May 8, 1998, he earned a nine point nine percent raise, which reflected his promotion to superintendent of access authorization. (Tr. at 231.) On March 26, 1999, one month before his discharge, Kester received a four percent raise. (Tr. at 231.) His final compensation rate at CP&L equaled \$6,124.00 per month. (Tr. at 231.)

According to Kester's calculations, his projected CP&L income for 1999 would have been \$91,385.92. (Tr. at 232; Cx. 130.) He calculated that figure by adding a four percent pay raise to his 1998 income. (Tr. at 232.) His actual income from CP&L in 1999 equaled \$34,422.87. (Tr. at 232; Cx. 130.) He received unemployment benefits for eighteen months that totaled \$6,102.00. (Tr. at 233.) He earned \$3,537.80 in 1999 as a prison guard for the State of North Carolina. (Tr. at 233.) In 1999, Kester lost \$47,323.25 in projected income. (Tr. at 233.) He estimated that he would have earned \$95,041.36 at CP&L in 2000. (Tr. at 233.) By subtracting the amount he actually earned as a

prison guard, he calculated a wage loss of \$72,602.38 for that year. (Tr. at 233-234.) Therefore, his total lost income for 1999 and 2000 equal \$119,925.62. (Tr. at 234.)

Assuming that he would have received a three percent raise in 2001 from CP&L, Kester would have earned \$97,892.60 in wages.³⁴ (Tr. at 234.) During the first three weeks of 2001, he would have earned a little more than \$5,500.00. (Tr. at 235.) As a prison guard, he actually earned \$1,326.92. (Tr. at 235.) As of the date of the hearing, Kester had lost \$4,320.70 in wages. (Tr. at 235.) Therefore, his total wage loss since 1998 equals \$124,246.32 and he continues to suffer wage loss for each week that he is not employed by CP&L. (Tr. at 235.) Kester estimates that the benefits CP&L offers to its employees are worth another twenty percent of his salary with the company.³⁵ (Tr. at 236.)

Discussion

In order to establish his prima facie case, Kester must prove that: (1) he engaged in protected activity; (2) that CP&L took some adverse action against him; (3) that CP&L had knowledge of the protected activity; and (4) that sufficient evidence exists that at least raises an inference that the protected activity was the likely reason for the adverse action. Harrison v. Stone & Webster Engineering Group, 93-ERA-44 (Administrative Law Judge's Recommended Decision and Order, November 8, 1994) (citing Sellers v. Tennessee Valley Authority, 90-ERA-14 (Sec'y Apr. 18, 1991); Boudrie v. Commonwealth Edison Co., 95-ERA-15 (ARB, Apr. 22, 1997)). The parties can use circumstantial evidence to prove the presence or absence of a retaliatory motive, even if witnesses testify that they did not perceive such a motive. Ellis Fischel State Cancer Hosp. v. Marshall, 629 F.2d 563, 566 (8th Cir. 1980), cert. denied, 450 U.S. 1040, 68 L.Ed.2d 237, 101 S.Ct. 1757 (1981)

To prevail in dual motive case, an ERA whistleblower complainant must establish, by a preponderance of the evidence, that the respondent terminated his employment, at least in part, based on the complainant's protected activity. If the complainant carries this burden, the respondent may avoid liability only by establishing, by clear and convincing evidence, that the complainant would have been terminated in the absence of the protected activity. See 42 U.S.C. § 5851(b)(3)(D); Timmons v. Mattingly Testing Services, 95-ERA-40 (ARB June 21, 1996). Employer bears the risk that the influence of legal and illegal motives cannot be separated. Mandreger v. The Detroit Edison Co., 88-ERA-17 (Sec'y Mar. 30, 1994).

Protected Activity

In this case, Richard Kester argues that he engaged in protected activity when he made an internal complaint to Terry Morton and John Caves alleging that Bob Gill wanted Kester to lie to an NRC investigator about his involvement in the falsification incidents. The court notes that an informal safety complaint to management is sufficient to establish protected activity. See Section 2909(a) of the Comprehensive National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3123.

³⁴His weekly income for 2001 would be \$1,882.54. (Tr. at 234.)

³⁵CP&L offers profit-sharing, stock options, medical and dental benefits, disability and life insurance. (Tr. at 236.)

Reynolds v. Northeast Nuclear Energy Co., 94-ERA-47 (ARB Mar. 31, 1996). Therefore, Kester's internal complaint constitutes protected activity if he can establish that a sufficient nexus exists between his complaint and the safety objectives of the ERA. Van Beck v. Daniel Construction Co., 1986-ERA-26 (Sec'y Aug. 3, 1998) at 3.

In Makam v. Public Service Electric & Gas Co., ARB No. 99-045, ALJ No. 1998-ERA-22 (ARB Jan. 30, 2001), the Administrative Review Board held that "the ERA does not protect every incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern. American Nuclear Resources v. U.S Department of Labor, 134 F.3d 1292 (6th Cir. 1998) (citing Stone & Webster Eng'g Corp. v. Herman, 115 F.3d 1568, 1574 (11th Cir. 1997)). To constitute a protected activity, an employee's actions must implicate safety definitely and specifically. American Nuclear Resources, Inc. v. United States Department of Labor, 134 F.3d 1292 (6th Cir. 1998). However, the employee's action does not have to directly affect nuclear safety for it to be protected. McCafferty v. Centerior Energy, 96-ERA-6 (ARB Oct. 16, 1996). For example, an employee's complaints about a hazard that has already been corrected or about a condition of which the employer is already aware can still be considered protected activity. Id. The court notes that a complainant's testimony, without corroborating evidence, may be sufficient to establish a prima facie showing of protected activity. Samodurov v. General Physics Corp., 89-ERA-20 (Sec'y Nov. 16, 1993).

CP&L argues that Kester did not engage in protected activity because his internal complaint did not relate to an aspect of health, safety, or quality control. CP&L relies on the testimony of Terry Morton and John Caves to argue that Kester was simply concerned about the blame he would receive for his role in the falsification event. (Tr. at 566, 704.) Neither Morton or Caves believed that Kester's comments related to safety concerns because Kester did not want to file a written complaint or speak to a qualified employee concerns representative. (Tr. at 568, 702-704.) Both Morton and Caves denied that Kester told them that he was asked to lie to the NRC. (Tr. at 566, 704.) Based on the foregoing information, CP&L argues that Kester's action is not protected because his comments lack a sufficient nexus to safety.

Gill denied that he asked Kester to lie to the NRC and Morton and Caves denied that Kester told them that Gill asked him to lie. Morton and Caves testified that Kester was concerned that he would be blamed unfairly for the falsification event and that he refused to take responsibility for his own poor management decisions with regard to the falsification. Kester, on the other hand, testified that he told Morton and Caves about the secret interviews and the fact that Gill was attempting to use the negative information garnered from those interviews to coerce him into taking full responsibility for the falsification event.

The court must rely primarily on credibility determinations to resolve whether Kester's internal complaint relates sufficiently to safety. Kester appeared to be a model employee at CP&L where he received promotions, accolades, and positive feedback for his work in the access authorization department. (Tr. at 58, 68-69, 87, 92; Cx. 35-38, 48-49, 70.) Although CP&L relies heavily on

Newsome's complaint, the employee survey results, the anonymous complaint, and the results of the employee interviews to establish that Kester had a history of performance problems,³⁶ the court notes that CP&L did not document any of this information or notify Kester of these problems until after the falsification events at the beginning of February 1999. Moreover, CP&L did not act on any of this information until after the falsification problems occurred. Prior to the beginning of February, CP&L treated Kester as a valued employee. He received a performance award five months prior to his termination and a positive evaluation three months prior to his termination.³⁷ (Tr. at 69-70, 92.) Gill discussed Kester's four percent pay raise with Kester two days prior to the start of Kester's medical leave. (Tr. at 198.)

Unlike Kester, Gill appeared to be less than a model employee. Gill was in charge of access authorization when the NRC conducted a previous investigation that led to a level three violation and a \$55,000 fine. (Tr. at 47- 48, 414; Cx. 33, Cx. 34.) Although CP&L did not terminate, demote or transfer Gill to another position as a result of the problems within the department, the court finds it reasonable to believe that CP&L would seriously consider termination, demotion, or transfer if Gill was responsible for another similar incident. Indeed, Bill Johnson testified that he considered terminating Gill for his involvement in the current falsification problems after Scotty Hinnant, the chief nuclear officer, "lit into [Johnson]...about the need to keep this from happening again." (Tr. at 804.) Hinnant, among other nuclear executives, was upset because "there was a track record of these access authorization events happening." (Tr. at 802.). The court finds it reasonable to believe that Gill attempted to protect himself from adverse employment action by coercing Kester into assuming total management responsibility for the current falsification problems. (Tr. at 50, 227.) Between Gill and Kester, the court finds that Gill had a greater impetus to lie about the details of his conversation with Kester.

CP&L argues that Kester was unwilling to accept responsibility for his own actions in the falsification event because he was concerned that his employment would be adversely impacted. Morton and Caves testified that Kester's complaints centered around his concern that he would be blamed unfairly for the falsification event. (Tr. at 566.) Caves testified that Kester told him that Gill wanted Kester to take responsibility for his own actions. (Tr. at 713; Cx. 121.) Gill denied that he asked Kester to lie to the NRC. (Tr. at 506.) Moreover, Morton and Caves denied that Kester told them that he was asked to lie to the NRC. (Tr. at 608, 711.)

The evidence in the record, however, contradicts this version of events. Kester took responsibility for poor management decisions, such as the destruction of the certification letters, which led to NRC violations. (Tr. at 221-222.) Moreover, the court finds it unreasonable to credit CP&L's

³⁶In a typed report that he prepared after the employee interviews, Gill documented Kester's on-going problems with procedure extensions, his unavailability after hours, and his nonresponsiveness to telephone pages. (Tr. at 367, 379-380, 390-391; Rx. 3.)

³⁷In the multipoint feedback part of the evaluation, Kester was marked as having strengths in five areas, including personal responsibility, team work, judgment, communications, and champion of change. (Tr. at 88-89.)

position that the fear of justified adverse employment action motivated Kester's comments to Morton and Caves when Kester knew that CP&L had not fired other employees whose mistakes had generated a NRC investigation and violations for the company. (Tr. at 46-48.)

The court finds Kester's testimony regarding his complaints to be more credible than the testimony provided by Morton or Caves. Indeed, Kester's actions and the details of his testimony have greater consistency than their testimony. After the crucial meeting with Gill regarding the secret interviews, Kester contacted Alan Britton, the superintendent of security at the Brunswick plant, to discuss what he should do. (Tr. at 182-183.) Britton could not recall the specifics of their conversation, but remembered that Kester's concerns stemmed from a conversation between Kester and Gill. (Tr. at 871.) Britton testified, "I remember having the conversation [with Kester]. And I thought it was important enough that he should take it to the employee concerns people." (Tr. at 874.) Britton's belief that Kester should report the conversation to the employee concerns group, which handles internal safety complaints, suggests that Kester's complaint implicated more than a mere personnel issue. (Tr. at 676.) Britton directed Kester to report the conversation to Terry Morton and Kester proceeded immediately to Morton's office to discuss his concerns. (Tr. at 183-184, 564.) Terry Morton testified that if his department had received a complaint that dealt with purely personnel matters, then it would have referred those matters to Human Resources or other management. (Tr. at 676.) In this case, Morton did not make such a referral, which indicates that Kester's complaint exceeded the level of a personnel problem.

Both Morton and Caves testified that Kester was concerned that he would be blamed for the entire falsification event, even though Kester did not believe he was responsible for everything that occurred. (Tr. at 566-568, 711.) Their statements corroborate Kester's testimony that Gill wanted him to take full responsibility for the falsification events despite the fact that Kester was not the only manager involved in the decision-making process. Unlike Morton, Caves remembered discussing the upcoming NRC investigation with Kester. (Tr. at 566, 593, 704, 713; Cx. 117.) Caves testified that Kester wanted to know what forms of "protection" would be available to him within the employee concerns program. (Tr. at 702.) However, Caves and Morton denied that Kester disclosed to them that he was asked to lie to the NRC. The court finds this testimony suspect. It is illogical to believe that Kester would have discussed the NRC investigation, expressed his concerns about being blamed unfairly for the falsification event, and asked about "protections" for himself within the employee concerns program without mentioning that Gill attempted to coerce him into taking full management responsibility for the falsification event during the NRC investigation.

Section 5851(a) of the Act protects an employee who "participated in... any...action to carry out the purposes of this chapter of the Atomic Energy Act of 1954, as amended." 42 U.S.C. § 5851(a)(1)(F). The court finds Kester's complaint to be an action "to carry out the purposes" of the Act. See Stone & Webster Engineering Corp. v. Herman, 115 F.3d 1568 (11th Cir. 1997) (finding that an employee's activity was protected where he acted in furtherance of safety compliance). By articulating his concerns to Morton and Caves, Kester attempted to guarantee that he could speak truthfully to the NRC investigator without fear of reprisal. Indeed, the ERA is intended to "promote a working environment in which employees are free from the debilitating threat of employment reprisals

for asserting company violations of statutes protecting nuclear safety and the environment.” Makam v. Public Service Electric & Gas. Co., ARB No. 99-045, ALJ No. 1998-ERA-22 (ARB Jan. 30, 2001). Therefore, a sufficient nexus exists between Kester’s actions and the safety objectives of the Act. The court finds that Kester’s internal complaint constitutes protected activity.

Adverse Action

Employer does not contest the fact that CP&L fired Kester on Monday, April 26, 1999. (Tr. at 216.) The court finds that Kester’s termination constitutes adverse action and satisfies his prima facie requirement.

Knowledge of Protected Activity

CP&L argues that Kester cannot prove that the individuals making the decision to terminate him were even aware of his communication with Morton and Caves. First, CP&L argues that Johnson made the ultimate decision to terminate Kester based, in part, on Nix’s recommendation. (Tr. at 769, 817; Cx. 124.) Both Nix and Johnson testified that they did not have any knowledge of Kester’s protected activity at the time that they made the decision to terminate. (Tr. at 769, 820.) Moreover, Caves and Morton testified that they did not disclose any information to Nix and Johnson about their conversation with Kester. (Tr. at 568-569, 704-705.)

Even though CP&L concedes that Gill was involved in the decision-making process to terminate Kester, the company argues that Gill did not have any specific knowledge about Kester’s conversation with Caves. (Tr. at 399, 409; Cx. 124.) Caves and Morton testified that they did not report their conversation with Kester to Gill. (Tr. at 568-569, 704-705.) Moreover, even if Gill had knowledge of the protected activity, CP&L argues that he did not make the decision to terminate Kester; rather, he was Kester’s strongest advocate. (Tr. at 404, 767-768, 818; Cx. 124.)

The Secretary of Labor has held that where the person who actually discharged the complainant was not aware of the protected activity at the time that he discharged the complainant, but an employee whose input contributed heavily to the decision to terminate was aware of the protected activity, then respondent is deemed to be aware of the protected activity. Awareness is determined by looking to those in the decision making process. Thompson v. Tennessee Valley Authority, 89-ERA-14 (Sec’y July 19, 1993)

A complainant can show that the respondent had knowledge of his protected activities when it took the adverse action by either direct or circumstantial evidence. Samodurov v. General Physics Corp., 89-ERA-20 (Sec’y Nov. 16, 1993). In either case, the evidence must establish that “an employee of the respondent with authority to take the complained of action, or an employee with substantial input in that decision, had knowledge.” Mosley v. Carolina Power & Light, 94-ERA-23 (Final Decision and Order, August 23, 1996, Administrative Review Board) (citing Bartlik v. TVA, Case No. 88-ERA-15, Sec. Ord., Dec. 6, 1991, slip op. at 7 n.7, and Sec. Dec., Apr. 7, 1993, slip op. at 4 n.1, aff’d, 73 F.3d 100 (6th Cir. 1996)).

Kester met with Morton and Caves shortly after the crucial meeting with Gill. Gill testified that another employee notified him that Kester was meeting with John Caves. (Tr. at 518-519.) Gill knew that John Caves worked in the performance evaluation regulatory affairs group, which handles internal safety complaints and compliance with the NRC. (Tr. at 518-519.) Kester testified that Gill seemed nervous on the day after Kester met with Morton and Caves. (Tr. at 882.) According to Kester, Gill asked him if he had discussed “what [they] talked about Friday” with someone outside the department. (Tr. at 192, 883.) Kester answered in the affirmative and told Gill that he felt that he needed protection. (Tr. at 518, 883.) Gill stated that he does not remember asking Kester if he had talked to someone outside the department. (Tr. at 518-519.) However, the court notes that Gill’s failure of memory does not constitute a denial. Gill testified, “I asked where he was. And he commented that he had sought protection or words to that effect.” (Tr. at 518.) Gill stated that he did not talk to Caves about Kester because “[i]f in fact Rich sought protection, that falls under the employee concerns program. That’s protected information.” (Tr. at 520.) The evidence establishes that Gill was aware that Kester met with Caves immediately following the conversation in which Gill allegedly attempted to coerce Kester into lying to the NRC. Moreover, Gill admitted that he knew that Kester had sought protection from Caves, which implicates the employee concerns program. Gill understood that the performance evaluation regulatory affairs group handled internal safety complaints. Based on the foregoing evidence, the court finds that Gill had knowledge of Kester’s protected activity.

The court also finds that Gill had substantial input in the decision-making process that led to Kester’s termination. Nix recommended Kester’s termination based on his insubordinate refusal to do a performance plan. (Tr. at 768.) Nix concluded that Kester was insubordinate based solely on Gill’s statements to her. (Tr. at 783-784.) She never spoke directly with Kester about his refusal to do a performance plan and she never conducted any interviews about Kester’s performance. (Tr. at 783-784, 786.)

Johnson agreed with Nix’s recommendation to terminate Kester. (Tr. at 768-769.) He stated that Kester’s “refusal to improve [his] performance was a key part of [the] decision to terminate.” (Tr. at 856.) Johnson concluded that Kester was insubordinate based solely on Gill’s reports to him. (Tr. at 811-812.) Johnson never attempted to interview Kester directly about what happened with the falsification event. (Tr. at 831-832.) He did not know that Kester had enrolled in two management seminars. (Tr. at 850.) Neither Johnson or Nix knew that Gill had extended the time for Kester to submit a performance plan until after he returned from his medical leave. (Tr. at 787-788.) If Gill had been a true advocate for Kester, he would have told Johnson and Nix that he had extended the time for Kester to submit a performance plan.

The evidence indicates that Kester did not refuse to improve his performance or refuse to submit a performance plan. On Friday, March 5, 1999, Gill disclosed to Kester that he had secretly been interviewing Kester’s employees. (Tr. at 179, 371.) Gill then indicated that Kester needed to develop a performance plan to address the negative criticism that Gill uncovered through the employee interviews. (Tr. at 395.) Given this context, the court finds it reasonable that Kester would be suspicious initially of the employee interviews, the negative feedback, and the need for a performance plan.

Kester testified that Gill did not give him a deadline for submission of the plan. (Tr. at 180,

189.) He also stated that Gill normally sent an e-mail showing a due date if he wanted something done by a particular date. In this case, Kester never received anything in writing that specified a due date. (Tr. at 353.) Although Gill testified that he repeatedly provided Kester with due dates, he did not provide any documentation to that effect. (Tr. at 393, 766-767.) Gill stated that he recorded his discussions with Kester, including deadlines for the submission of a performance plan, in a writing that he made soon after their March 5th meeting. (Tr. at 513; Rx. 4.) In the absence of authentication besides Gill's own testimony, the court does not find this document to be sufficient corroboration of Gill's statements. There is no objective proof of when the document was written or whether it accurately reflects his discussions with Kester. (Tr. at 513.) The self-serving nature of the document makes it inherently suspect.

Kester's actions do not reflect an unwillingness to improve his performance. He enrolled in two management training courses, which Gill acknowledged as a step in the process of improvement. (Tr. at 308.) Kester indicated to Gill that he had trouble working on a performance plan because of other obligations, including assisting with the NRC inspection and preparing for the Brunswick outage. (Tr. at 200.) He told Gill that he would have plenty of time to work on his performance during his medical leave. (Tr. at 198-199.) However, Gill indicated to Kester that he did not need to worry about the performance plan. (Tr. at 198-199.) Gill testified that he told Kester that they would have time to work on the performance plan after Kester returned from his medical leave. (Tr. at 526, 787-788, 858-859.) Kester's enrollment in training classes indicates that he had a willingness to improve his performance. Moreover, Kester's willingness to work on the plan during his medical leave undermines Gill's statements to Nix and Johnson that Kester absolutely refused to submit a performance plan. (Tr. at 767, 811.) Gill's statement that he and Kester could work on the plan when Kester returned from medical leave is inconsistent with Gill's position that Kester received definite deadlines that he failed to meet. Based on the foregoing information, the court finds that Gill's statements to Nix and Johnson about Kester's refusal to improve his performance were false and misleading.

Nix and Johnson relied heavily on Gill's statements in making the decision to terminate Kester. Johnson testified that Kester's "refusal to improve [his] performance was a key part of [the] decision to terminate." (Tr. at 856.) The court notes that Gill's token advocacy of Kester to Nix and Johnson does not nullify the critical role he played in the decision-making process which led to Kester's termination. Gill had knowledge of the protected activity and he had substantial input into the decision-making process through his comments to Nix and Johnson about Kester's alleged insubordination. Therefore, the court finds that knowledge of Kester's protected activity can be imputed to CP&L.

Inference of Causation

Where an adverse action closely follows protected activity, the inference of causation may be sufficiently established. See, e.g., Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989); Mitchell v. Baldridge, 759 F.2d 80, 86 (D.C. Cir. 1985). In this case, Kester made his complaint to Terry Morton and John Caves on Monday, March 8, 1999. (Tr. at 183-186.) On Monday, April 26, 1999, CP&L terminated Kester's employment. (Tr. at 216.) Less than two months elapsed between Kester's protected activity and the adverse action. The court finds the close temporal proximity between the protected activity and adverse action is sufficient to establish the inference of causation.

Rebuttal of Prima Facie Case

To rebut the prima facie case, the respondent has the burden of articulating a legitimate, nondiscriminatory reason for the adverse action. Adornetto v. Perry Nuclear Power Plant, 1997-ERA-16 (ARB Mar. 31, 1999). The respondent need not persuade the court -- the burden is only of production. Bausemer v. TU Electric, 91-ERA-20 (Sec'y Oct. 31, 1995), citing Kahn v. United States Secretary of Labor, 64 F.3d 271, 278 (7th Cir. 1995).

CP&L articulated a number of legitimate, non-discriminatory reasons for terminating Kester's employment, including: (1) Newsome's December 1998 complaint, (2) the employee survey results that reflected dissatisfaction and poor morale within Kester's group, (3) Kester's poor management decisions and his lack of communication in handling the falsification event, and (4) the anonymous allegation and interview comments related to management problems in access authorization. (Tr. at 118-119, 131, 141, 248-251, 358, 367, 807; Cx. 137; Rx. 1; Rx.14.) The court finds that CP&L sustained its burden to produce legitimate, non-discriminatory reasons for terminating Kester's employment.

Pretext

Where the respondent articulates a legitimate, nondiscriminatory reason for the adverse action, the complainant has the ultimate burden of persuading the court that the reasons articulated by the respondent are pretextual, either by showing that the unlawful reason more likely than not motivated the respondent or by showing that the proffered explanation is unworthy of credence. Nicholas v. Bechtel Construction, Inc., 87-ERA-44 (Sec'y Oct. 28, 1992) (as corrected by Oct. 30, 1992 Errata Order).

Johnson stated that he terminated Kester's employment for a variety of reasons. In an initial statement to the Department of Labor, Occupational Safety and Health Administration, he enumerated his reasons:

First, the employee survey process is an important management tool and we take the results very seriously. The results, the concerns voiced by employees, indicated that Mr. Kester was not working out as a superintendent. Second, when informed of his performance problems, Mr. Kester's reaction was to ignore them. He refused to take any actions to correct his performance. He came close to termination based on this conduct alone. Finally, I am not satisfied with his performance with regard to the falsification of records event.

(Cx. 148, p.2.) At the hearing, Johnson testified that his decision to terminate "came down to the performance and the falsification event, and then the lack of interest in improving performance after the event, despite given several chances to do so." (Tr. at 817.) Johnson stated that he would never have terminated Kester based solely on his conversation with Cindy Johnson regarding the poor company-wide employee survey results for the access authorization department. (Tr. at 823.)

The following question and answer illustrate Johnson's state of mind regarding Kester's

termination:

Q And without his refusal to improve, his alleged refusal to improve, you wouldn't necessarily have discharged him. Right?

A I might not have discharged him then, that's correct. I may have discharged him later based on what the NRC found and other things.

(Tr. at 856.) He stated that the "refusal to improve performance was a key part of [his] decision to terminate." (Tr. at 856.)

Kester fails to establish that all of CP&L's articulated reasons are pretextual. He does not address Robin Newsome's 1998 complaint to Bob Gill regarding Kester's attempts to obstruct the performance of her job. To the extent that Kester addresses the poor 1998 survey results, he makes the following points: (1) Cindy Johnson did not work in access authorization or corporate security, (2) the complaints were from anonymous employees, (3) Bill Johnson had no knowledge of the personality dynamics within corporate security, (4) Bill Johnson had no knowledge of Kester's relationships with his employees, (5) Bill Johnson never spoke with Kester about the anonymous complaints, and finally (6) that Bill Johnson would not have terminated Kester based on this information.

The court notes that many of Kester's arguments are irrelevant to the determination of whether the proffered reason for termination, the 1998 survey results, is pretext for discrimination. Specifically, the court finds it irrelevant whether Cindy Johnson worked in access authorization or corporate security or whether Bill Johnson had knowledge of the personality dynamics in corporate security or of Kester's relationships with his employees. Kester offered no evidence to discredit Cindy Johnson's statement to Bill Johnson that she represented a group of access authorization employees who wanted to make it clear that the negative employee survey results were a reflection on Kester's management. (Tr. at 368.) Moreover, he offered no evidence that any negative survey results attributable to access authorization and his management were illegitimate.

However, the court finds it troubling that no one notified Kester of the poor survey results until after the falsification event occurred. The fact that CP&L waited to discuss the poor results with Kester belies Johnson's statement that CP&L treated the results as a serious indication that Kester was ill-suited for his position as superintendent of access authorization. Nevertheless, despite CP&L's hesitancy to act on Cindy Johnson's statements, the court finds no evidence to indicate that Cindy Johnson lied when she stated that she represented a number of access authorization employees who were dissatisfied with Kester's management style and expressed their dissatisfaction in the company-wide survey. Finally, the court notes that Kester's last point needs clarification. Although Bill Johnson testified that he would not have terminated Kester's employment based solely on Cindy Johnson's statements regarding the company-wide survey, he never indicated that the poor survey results would not be a factor in addressing Kester's future employment with CP&L.

Johnson also considered Kester's poor performance in handling the falsification event when he

made the decision to terminate Kester's performance. Kester admitted that he made poor management decisions in handling the falsification. For instance, he never denied responsibility for the destruction of two of the original certification letters, which constituted an NRC violation. (Tr. at 221-222.) He also admitted that he handled the decisions regarding the falsification event through February 3, 1999, including the decision not to discontinue access on January 29, 2001 of the three individuals with falsified backgrounds. (Tr. at 250-251.) The NRC found that the failure to remove those individuals' access authorization warranted a level four violation. (Tr. at 250.) According to Johnson, the NRC inspector ultimately indicated that CP&L's "program in terms of policy and procedures was in good shape, or very sound, and that the falsification event was a problem with judgment in applying policies and procedures under the regulations." (Tr. at 815.)

Johnson considered other poor decisions that Kester made during the falsification in making his decision to terminate Kester's employment. When David Crook recommended that Kester put in a condition report about the falsification event on Thursday, February 4, 1999, Kester stated that he did not think "it [would] hurt anything until [they had] all [their] ducks in a row" before filing the condition report. (Tr. at 131.) Gill testified that he was very critical of Kester for failing to initiate a condition report on February 3rd. (Tr. at 388; Rx. 3.) He testified that "[w]hen [Kester] characterized to David Crook that it was still up in the air, whether [they] would write a CR, that was inexcusable from [Gill's] standpoint." (Tr. at 388.) Kester also failed to notify Scott Young, the superintendent of physical security, about the falsification event when he had the opportunity on Thursday, February 4, 1999. (Tr. at 143.)

Although Kester accepted some responsibility for poor management decisions, he argued that Gill was also responsible for poor decision-making regarding the falsification event. Gill approved of Kester's actions through February 3, 1999. (Tr. at 341-342.) According to Kester, Gill assumed responsibility for the decisions regarding the falsification event from February 5th onward, including the way the department improperly handled the 3rd falsification discovered on Friday, February 5th. (Tr. at 222-223, 342, 344-345.) While CP&L terminated Kester's employment, the company did not terminate Gill's employment. As a result of his involvement in the falsification event, Gill lost the opportunity for a promotion, received a negative performance evaluation, and did not receive as much of a raise as he might have in the absence of the event. (Tr. at 820.)

Kester argues that CP&L used his poor performance regarding the falsification event as pretext for discrimination by establishing that the company treated Gill, an equally culpable manager, more favorably than Kester. It is clear that CP&L judged Kester, the superintendent of access authorization, more harshly than Gill for the role he played in the falsification event. For instance, even though Kester was out of the office when access authorization discovered the actual badging of a worker with a falsified background on February 5th, Johnson testified that Kester "[was] in charge to the extent that he [was] responsible for the folks." (Tr. at 826.) After examining the totality of the record, it is clear that CP&L held Kester to a higher standard because he was the immediate management in charge of the access authorization department and involved from the beginning in handling the falsification event.

Although the court recognizes that Kester's termination appears harsh compared to Gill's punishment, it does not matter whether the discharge was warranted under the circumstances but only whether Kester's termination was in retaliation for protected activity. Seraiva v. Bechtel Power Corp.,

84-ERA-24 (ALJ July 5, 1984), adopted (Sec’y Nov. 5, 1985). Kester admitted that he made poor management decisions in handling the falsification event, which led to multiple violations from the NRC. CP&L considered those violations extremely serious in light of the company’s past problems with the NRC. (Tr. at 802.) When Johnson made the initial decision to withhold termination to give Gill and Kester the opportunity to improve their performance, he stated, “I thought it was a little maybe premature to draw that harsh a conclusion about termination at that time. We could work on performance. We could see what the NRC investigation turned up.” (Tr. at 807.) It is clear from this statement that the results of the NRC investigation would be an important factor in Johnson’s ultimate decision regarding termination. Gill, who Kester argues tainted the decision-making process regarding his termination, had nothing to do with a number of Kester’s poor management decisions. The NRC also made its determinations regarding the issuance of violations independent of Gill’s involvement. Therefore, Kester failed to establish that his admittedly poor performance was an illegitimate factor in his termination.

CP&L also cited the anonymous allegation and the comments from the employee interviews handled by Gill as an indication of Kester’s performance problems. Kester argues that Gill initiated the secret employee interviews in order to cultivate biased information on Kester because he knew that an NRC investigation would result from the falsification event and he wanted to ensure that he could coerce Kester into accepting full management responsibility for the event. The court shares Kester’s concerns about the anonymous allegation and the secret employee interviews. The court finds the timing of the anonymous complaint, which occurred around February 5, 1999, to be highly suspicious. (Tr. at 179, 372, 477.) Although Shawn Nix testified that it is ordinary for a manager to investigate issues within his own department without involving Human Resources, Gill’s actions in conducting the secret interviews appear improper considering that the anonymous complaint requested outside intervention. (Tr. at 762-763; Rx. 1.) Gill showed incredibly poor judgment by not involving an unbiased third party in the investigations of the anonymous complaint.

Kester attempts to discredit the legitimacy of the employee comments regarding his performance by alleging that Gill presented biased results to Nix and Johnson that emphasized the negative remarks of his co-workers. After an exhaustive review of the record, the court concurs with Kester’s assessment that Gill presented a skewed version of the interview results to Nix and Johnson. Despite the fact that the interviewees made positive statements about Kester, Gill provided a summary of interview comments that did not include any favorable comments. (Tr. at 478-479, 484; Cx. 89.) Gill did not provide his handwritten notes, which included positive comments, to Nix or Johnson. (Tr. at 487.) The written documentation provided to Nix and Johnson emphasized the negative feedback of Kester’s performance. The few comments that Gill made to Nix and Johnson regarding the positive feedback that he received could not dilute the overwhelmingly negative impression of Kester’s performance that Gill cultivated for Nix’ and Johnson’s benefit. (Tr. at 486, 769.)

However, the fact that Gill emphasized the negative aspects of Kester’s performance does not negate the underlying truth or validity of the negative employee comments. Kester offered no evidence that Gill concocted the negative feedback that he received in the employee interviews. Moreover, he offered no testimony from employees within his department that contradicted the negative impression of Kester’s management style. Kester failed to establish that CP&L used the employee comments reflecting dissatisfaction with Kester’s management as pretext for discrimination. The court has no

reason to doubt the truth of those statements; therefore, the employee dissatisfaction with Kester's management style appears to be legitimate motivation for Kester's termination.

Finally, CP&L cites Kester's refusal to improve his performance as a factor in the decision to terminate his employment. Johnson testified that his decision to terminate Kester's employment "came down to the performance and the falsification event, and then the lack of interest in improving performance after the event, despite given several chances to do so." (Tr. at 817.) He stated further that the "refusal to improve performance was a key part of [his] decision to terminate." (Tr. at 856.)

As the court discussed earlier in this opinion, Gill's statements to Nix and Johnson about Kester's refusal to improve his performance were false and misleading. Gill told Nix and Johnson that Kester absolutely refused to improve his performance. (Tr. at 767, 811.) However, the evidence indicates that Kester showed a willingness to improve by enrolling in training classes and stating to Gill that he would have time to work on the performance plan during his medical leave. (Tr. at 767, 811.) The fact that Gill made false and misleading statements regarding Kester's willingness to improve his performance indicates that Kester's insubordinate refusal to submit a performance plan is a pretextual reason for his termination.

The court must determine whether the only pretextual reason, Kester's insubordinate refusal to improve his performance, more likely than not motivated Johnson's decision to terminate Kester's employment. Johnson testified:

Q And without his refusal to improve, his alleged refusal to improve, you wouldn't necessarily have discharged him. Right?

A I might not have discharged him then, that's correct. I may have discharged him later based on what the NRC found and other things.

(Tr. at 856.) He stated that the "refusal to improve performance was a key part of [his] decision to terminate." (Tr. at 856.)

Based on the foregoing statements, the court cannot conclude that the alleged refusal to improve motivated Johnson's decision to terminate Kester's employment. Although Johnson stated that he might not have discharged Kester if Kester had not refused to improve his performance, there is no indication that Johnson would not have terminated Kester anyway based on the survey results, Kester's poor performance, and the impending NRC violations. Kester has the burden of establishing by a preponderance of the evidence that Gill's false and misleading statements more likely than not motivated Johnson's decision to terminate Kester's employment. After an exhaustive review of the record, the court concludes that Kester failed to meet his burden.

Dual Motive Analysis

Kester still may be able to prevail based on a mixed-motive analysis. To prevail, he must

establish, by a preponderance of the evidence, that CP&L terminated his employment, at least in part, based on his protected activity. The Administrative Review Board has held that a complaint must produce “‘evidence that directly reflects the use of an illegitimate criterion in the challenged decision, ‘[i.e.,] evidence showing a specific link between an improper motive and the challenged employment decision.’” Talbert v. Washington Public Power Supply System, 93-ERA-35 (ARB Sept. 27, 1996) (citing Carroll v. United States Department of Labor and Bechtel Power Corp., No. 95-1729, 1996 U.S. App. LEXIS 3813, at *9 (8th Cir. 1993), quoting Stacks v. Southwestern Bell Yellow Pages, Inc., 996 F.2d 200, 202 (8th Cir. 1993)). If the complainant carries this burden, then the respondent may avoid liability only by establishing by clear and convincing evidence that the complainant would have been terminated in the absence of the protected activity. Timmons v. Mattingly Testing Services, 95-ERA-40 (ARB June 21, 1996).

In Fuller v. Phipps, the Fourth Circuit articulated the complainant’s evidentiary burden:

“[n]ot all evidence that is probative of discrimination will entitle the plaintiff to a [mixed motive] charge.”... Otherwise, any plaintiff who is able to establish a prima facie showing in a pretext case would qualify for a mixed-motive instruction, conflating the two categories of cases and subverting the Supreme Court’s efforts to distinguish the two theories. ... (“Simply because a discriminatory reason might be inferred from a prima facie case does not mean that a mixed motive case exists.”). What is required instead is evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision....

Fuller v. Phipps, 67 F.3d 1137, 1142 (4th Cir. 1995) (citations omitted). The strength of the evidence establishing discrimination determines whether a case is a pretext or mixed motive case. Fuller, 67 F.3d at 1143. If the evidence is not sufficiently direct, then mixed motive analysis is inappropriate. Fuller, 67 F.3d at 1144.

In this case, the court finds that the mixed motive analysis is inappropriate because Kester failed to present evidence that reflects directly on Gill’s discriminatory attitude and that bears directly on Kester’s termination. Kester failed to produce any evidence that Gill made discriminatory statements related to the Kester’s discharge. Although Kester made an inferential connection between the protected activity and Gill’s retaliatory conduct, he failed to satisfy the evidentiary threshold required to trigger mixed-motive analysis. For the evidence to be sufficiently direct, it should be evidence that can be interpreted as an acknowledgment of discriminatory intent. Wagner v. Dillard Department Stores, Inc., 2001 WL 967495 (4th Cir. (N.C.)) (citing Maldonado v. U.S. Bank, 186 F.3d 759, 763 (7th Cir. 1999)). He produced no evidence that signaled an acknowledgment of discrimination; rather, he merely established the inference of discrimination. He did not show a specific link between the retaliatory motive and his termination. Therefore, Kester is not entitled to and cannot prevail under a mixed-motive analysis.

Although Kester established a prima facie showing of retaliatory discharge, he failed to prove by a preponderance of the evidence that CP&L terminated him in retaliation for his protected activity. Therefore, **IT IS HEREBY RECOMMENDED** that the complaint filed under the ERA by Richard Kester be **DISMISSED**.

A
RICHARD K. MALAMPHY
Administrative Law Judge

RKM/kap
Newport News, Virginia

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten days of the date of this recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§ 24.7(d) and 24.8.